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NOTES.

IN *Guardians of West Ham Union* v. *Guardians of Edmonton Union* [1907] W.N. 235, 77 L. J. K. B. 85, the House of Lords (Lord Loreburn L. C., Earl of Halsbury, Lord Macnaghten, and Lord Atkinson) decided reversing the judgments below in both Courts, that when a parish is divided into separate parishes under s. 1, sub-s. 3 of the Local Government Act, 1874, a settlement acquired in the undivided parish before the division is not extinguished, and by reason of such previous settlement, a person acquires a settlement in whichever of the separate parishes he had previously resided so as to acquire a settlement. The result is to overrule the two well-known cases of *Reg.* v. *Inhabitants of Tipton* (1842) 3 Q. B. D. 215, and *Guardians of St. Saviour's Union* v. *Guardians of Dorking Union* [1898] 1 Q. B. 594. In this case a pauper lunatic named Forrest resided at Brampton Park Road, then in the Parish of Tottenham. Under s. 36 (2) of the Local Government Act, 1894, that parish was divided, with the result that Brampton Park Road is now in the parish of Wood Green. And so from henceforth there were two parishes for poor law purposes where there had been but one, namely, the parish of Wood Green and the parish of Tottenham. The question was whether the settlement acquired by the pauper in the parish was destroyed by the division. The justices held that the place of last legal settlement was in the parish of Wood Green, and ordered the respondents to refund to the West Ham Union the sums of money expended by the latter as outlay on the pauper. The Divisional Court and the Court of Appeal, following *Reg.* v. *Inhabitants of Tipton*, cited *supra*, and *Guardians of St. Saviour's Union* v. *Guardians of Dorking Union*, cited *supra*, held that when by the operation of a Local Government Act an old parish had been split into two separate parishes, all pauper settlements in the old parish were destroyed, and that as the administrative entity in which the pauper lunatic acquired a settlement had been divided, and its entity thereby destroyed, the pauper's right to a settlement had

been destroyed with it. The Lords Justices in the Court of Appeal expressed no opinions of their own, and merely followed *Reg.* v. *Tipton* as a binding authority. That case, however, had already been doubted in the House of Lords: *West Ham* v. *London County Council* [1904] A. C. 40; and by the present final decision the principle of the last-named case is held to apply equally whether the original parish has been added to and enlarged, or divided into two or more parishes.

It has also been held in Scotland (the *Parish Council of the City Parish of Edinburgh* v. *Parish Council of the City Parish of Glasgow* [1898] 25 R. 385, followed in *Edinburgh City Parish Council* v. *Gladsmuir Parish Council* [1901] 3 F. 753) that the acquisition of a settlement by industrial residence in a parish will not be interrupted by the parish being combined with other parishes into a new parish by an order of the Secretary for Scotland, but the settlement, when acquired, will be in the united parish. When an entire parish is, by an order of the Secretary for Scotland, combined with other parishes into a united parish, an industrial settlement acquired in it prior to the unification order may be retained by the statutory residence in the united parish in place of the original parish.

The Lord Chancellor said in the principal case: 'It is a satisfaction to me, in moving to reverse this judgment, that Lord Chief Justice Cockburn and Mr. Justice Blackburn in *Stourbridge Union* v. *Droitwich Union*, L. R. 6 Q. B. D. 769, plainly expressed their disapproval of the authority which I hope this House will now overrule, that similar views have been expressed in this House, and that Lord Chief Justice Denman himself, who was responsible for that decision, appears to have had grave misgivings as to its correctness.' The certainty now given to the law on a point which had caused much trouble will be no less satisfactory to the profession and other persons concerned.

G. Addison Smith.

In the argument of *Villar* v. *Gilbey* [1907] A. C. 139, 141, 76 L. J. Ch. 339, it is said that *In re Burrows* [1895] 2 Ch. 497, was a case of benefit, and the Lord Chancellor's opinion [1907] A. C. p. 146 says that he cannot find that *In re Burrows* supports the view of the Court of Appeal. Now, in *In re Burrows* there was a devise to *A* for life, and upon her death to *B* in case she had issue living at the death of *A*, but in case she had no issue living, then over. A child was born to *B* the day after *A*'s death. It was held that *B* took absolutely. Her child was considered as born not for its own benefit but for the benefit of the mother. I do not say that *In re Burrows* was necessarily

right. It was undoubtedly an extension of the law as previously expressed. It seemed to me rather a happy decision, because it made the law with regard to perpetuities, where undoubtedly a person is considered as born although it is not for his own benefit, an instance of a general rule instead of being an exception; but certainly the case is a distinct authority against the decision which the House of Lords reached. J. C. G.

Since we received the foregoing note from our very learned correspondent the Court of Appeal has held that the result of *Villar* v. *Gilbey* is to confine the rule of construction to cases where its application is for the benefit of the unborn child, but not to affect its application in such cases: *In re Salaman* [1908] 1 Ch. 4. Farwell L. J. adopted Mr. Vaughan Hawkins's statement of the rule, in his well-known treatise on Wills, as absolutely accurate: 'A devise or bequest to children *born* or to children *living* at a given period includes a child *en ventre* at that period and born afterwards.' *Villar* v. *Gilbey* did not abrogate this rule or reduce it to a mere presumption, as was supposed in the Court below. Probably it is useless to ask Mr. Vaughan Hawkins why he has never given the profession a second edition of a book which we may not quite call authoritative, but may and do call classical. It remains to be seen whether 'living' will still be held capable of a wider construction, apart from any special rule, than 'born,' and whether *In re Burrows* cannot be supported on that ground.

The time has not yet arrived for anything like a full consideration of the judgment delivered by the Court of Appeal in *Ogden* v. *Ogden* [1907] W. N. 236, 24 T. L. R. 94. From the report of the case published in the Times L. R. two inferences may forthwith be drawn. Of these the one is certain, the other probable. The certain inference is that the Court of Appeal is prepared to carry out to the full the principle established by *Simonin* v. *Mallac*, 1860, 2 Sw. & Tr. 67, and to hold that the validity of a marriage celebrated in England, though the husband be a Frenchman domiciled in France, and the wife an Englishwoman domiciled in England, must be determined, in so far, at any rate, as the matter depends on a question of law, by the law of England (*lex loci contractus*) and not by the law of the country where the husband is domiciled (*lex domicilii*), i. e. of France, and, further, that a marriage celebrated in England and valid by the law of England is not to be treated as invalid because it is declared a nullity by a French Court. The second and probable, but only probable, inference is that in 1907 the Court of Appeal, though it does not absolutely overrule, certainly looks with little favour upon

the judgment given by the Court of Appeal of 1877 in the case of *Sottomayor* v. *De Barros*, 3 P.D. 1, 5. In fact the judgment of the Court of Appeal in 1877 was based upon the principle that 'the question of personal capacity to enter into a contract is to be decided by the law of domicil,' and that 'as in other contracts so in that of marriage, personal capacity must depend on the law of domicil,' whilst in 1907 the Court of Appeal certainly leans towards the opinion that contractual capacity generally depends upon the law of the country where a contract is made, and therefore where a marriage is celebrated. The view of a man's contractual capacity as an ambulatory incident, not of his permanent personal law as religious and archaic legal systems conceive it, but of the law of his domicil, may perhaps come to be regarded as a transitory compromise between the ancient personal and the modern territorial doctrines, and a compromise not having any great merit of either elegance or convenience.

Lacons v. *Warmoth* [1907] 2 K.B. 350, 76 L.J. K.B. 914, C.A., is a curious and perplexing case. The facts are quite simple: an executor disposes of the assets without providing against the testator's contingent liability under a guaranty. The condition is fulfilled, and shortly after the time when the testator, if living, would have become liable, but more than six years after the distribution of the assets, the creditor under the guaranty sues the executor. Surely the case is analogous, on principle and in justice, to other well-known classes of cases where the cause of action dates—and consequently the Statute of Limitation runs—not from the defendant's act or default but from the actual happening of the damage. But the Court of Appeal has held that the action is barred.

The decision seems doubtful on two grounds. First, the Court reasons as if there had formerly been a special action of *devastavit* against an executor. But the old process of *devastavit* was a process of execution against the executor personally, in an action brought against him in his representative capacity when the sheriff had returned 'nulla bona' to the usual writ of execution 'fieri facias de bonis testatoris': 1 Wms. Saund. 246-249. It should seem, therefore, that the Statute of Limitation would run in the executor's favour, if at all, only from the date of the sheriff's return. It is true that the later practice was to bring debt on the judgment in the original action, suggesting a devastavit (not if the sheriff returned a devastavit, in which case the plaintiff could at once have a writ of execution 'de bonis propriis'). This only makes

it clearer that there was no cause of action against the executor before the creditor had actually failed to get satisfaction from the testator's goods. The gist of the action was the damage and not the original default. Still, if the Court of Appeal has erred herein, it is not without a show of authority: for Page Wood V.C. said in *Thorne* v. *Kerr* (2 K. & J. at p. 63): 'At law, if an executor committed a devastavit the remedy was by action of trespass against him.' This would seem to be a mere blunder, but Bacon V.-C. in *In re Gale* (22 Ch. D. at p. 825) followed it as an authority that time ran from the date of the devastavit.

Assume, however, that the process of devastavit was in the nature of an action for a tort in parting with the assets. It remains a fundamental principle that Statutes of Limitation (like the analogous statutes on prescription, with the peculiar exception of the case of light) proceed on the assumption that a party has been sleeping on his rights, and is guilty of laches in failing to put an accrued right of action in force for a long period. Now in *Thorne* v. *Kerr* and *In re Gale* there was an existing right of action for debt when the act of devastavit took place, upon which a judgment might have been obtained and the process of devastavit put in force, so that the creditor had in a sense been sleeping on his rights. But it seems that, in the case under discussion (even on the assumption that the process of devastavit is analogous to an action of tort), the liability on the testator's guaranty being only contingent when the parting with the assets took place, the plaintiffs could not have then taken any proceedings in respect thereof; they could not be said to have sustained any damage until the claim accrued on the guaranty. The result of the decision, therefore, seems to be that the Statute of Limitation may run against a party at a time when he can do nothing to assert his right. The judgments do not appear to deal with this difficulty, but assume that the case was governed by *Thorne* v. *Kerr* and *In re Gale*; which, with great submission, it was not. On this ground also the decision appears open to grave doubt.

In *Challoner* v. *Robinson* [1908] 1 Ch. 49, the Court of Appeal found it impossible to extend an irrational exception, formulated towards the middle of the eighteenth century, from a still less reasonable rule which has been part of the law of landlord and tenant ever since leasehold interests have been known to the law. The practical conclusion is that no one is safe in sending pictures or other objects to a loan exhibition without being assured that the exhibition room is in the occupation of the freeholder or of a solvent

tenant. Such things are privileged from distress only if the person entrusted with them is a dealer in objects of that kind, and authorized by the owner to dispose of them. According to Neville J. the authority must be to deal with all buyers, not with a limited class like members of a club and persons invited by them; but the Court of Appeal preferred not to rely on this ground.

In *re W.*, *W.* v. *M.* [1907] 2 Ch. 557, C. A., it appears that in July last Kekewich J. sanctioned a change in the religious education of a ward of Court aged thirteen years. In 1904 a boy, then ten years of age, was directed by the Court to be brought up in the Jewish faith, which was the faith of his deceased father. After the boy went to school he became desirous of being brought up in the Christian faith, and Kekewich J., after interviewing the boy and considering replies to the most careful enquiries which his lordship had directed to be made, ordered the change to be made. The friends of the boy appealed, and upon the appeal the Master of the Rolls referred to the judgment of Turner L. J. in *Stourton* v. *Stourton*, 8 D. M. & G. 760, 771, and also to the judgment of Lindley L. J. *In re McGrath* [1893] 1 Ch. 143, 148, which clearly show that the paramount duty of the Court of Chancery, rising at times even above religious distinctions and parental wishes, is to consult the moral and religious, as well as physical and material welfare of the child himself. In carrying out this duty the Court possesses the power not only to make but also to vary an order dealing with the important question of a child's religious training. We presume that 'the Christian faith' signifies in judicial proceedings, if nothing to the contrary is expressed, the doctrines of the Church of England; but we do not remember any modern authoritative statement to that effect.

The decision of Warrington J. in *Howatson* v. *Webb*, noted in our last number, L. Q. R. xxiii. 366, is now affirmed by the Court of Appeal [1908] 1 Ch. 1, 77 L. J. Ch. 32. Incidentally the suggestion of Swinfen Eady J. in *Bagot* v. *Chapman* (see L. Q. R. u. s.), that the conveying part of a mortgage might be severed from a personal covenant for payment of the debt so as to hold the former good and the latter bad, is disapproved by the Master of the Rolls and Farwell L. J. Further, it is thought doubtful whether the authority of the old decisions which allowed a plea of 'non est factum' on the ground that the contents of the deed were misrepresented would now be held to apply beyond the cases of blind or illiterate persons. But the current opinion early in the sixteenth century was other-

wise: see Keilw. 70 *b*, pl. 6, where it is said that if a feoffee, being authorized by the feoffor to make a deed for one acre of land in Dale, makes it for two, and misreads it to the feoffor, who thereupon executes it, the deed is void whether the feoffor be literate or not; though it does not appear how far this was relevant to any question before the Court for decision[1]. There is a modern Indian case, *Oriental Bank Corporation* v. *Fleming* (1879) 3 Bom. 242, which in this connexion may be found more instructive than the earlier ones; we do not say that all the reasons given for the decision, which was on peculiar facts, are equally good.

In the *London Investment Trust Limited* v. *The Russian Petroleum and Liquid Fuel Company Limited* [1907] 2 Ch. 540, 77 L. J. Ch. 21, C.A., a further light was thrown on the pathway marked out by *In re W. Tasker & Sons, Lim.* [1905] 2 Ch. 587, 74 L. J. Ch. 643. In the latter case, as the learned reader will remember, a company issued some debentures but was thereby restricted from creating any mortgage or charge in priority to or *pari passu* with them. A portion of these debentures was issued to a particular person as security for a loan made by him to the company. The loan having been repaid, and the debentures handed back, the company was restrained by the Court from reissuing them for fresh consideration so as to enable the fresh holders to rank *pari passu* with those debenture holders who had the rest of the debentures of the same creation. The case of the *Russian Petroleum Company* shows that a deposit of similar debentures with bankers to obtain credit for a particular sum does not, when the particular sum has been repaid, entitle the company to incur a fresh liability with the bankers upon the security of the same debentures. In the Court of Appeal, however, Cozens-Hardy M. R. observed that if the original arrangement with the bankers had been the opening of a current account with a maximum overdraft of the amount specified, the company might then have argued with some force that it was at any time during the existence of the overdraft entitled to increase the overdraft up to the stipulated amount. Supposing this to be the law, presumably even the latter right would vanish if the account once became closed, unless special provision had been made for reopening it.

There is an increasing tendency to make experiments in pushing literary rights in both published and unpublished matter to an

[1] It may be worth while to observe that the book cited as Keilwey's Reports is really, as appears by the preface, a selection from Robert Keilwey's commonplace book made by the editor Croke as a supplement to the contemporary Year Books.

extent which, if allowed, would be vexatious to readers, oppressive to the republic of letters, and not necessarily profitable to the author himself, or to any one claiming through him by a meritorious title. Such an attempt was made in *Philip* v. *Pennell* [1907] 2 Ch. 577, 76 L. J. Ch. 663, where Whistler's executrix objected to the defendants, who had been authorized by Whistler himself to write his biography, making use for that purpose of information derived from letters and other writings of Whistler's communicated to them by the owners thereof. The defendants had no intention of publishing the text of these writings, and no question of any specific breach of confidence was raised. It might not be very hard to infer as a fact that an authority from *A* to *B* to write *A*'s life does imply permission or even encouragement to use all such information, being in itself not unfit to be published, as *B* can obtain from any letters or papers written by *A* to which he has lawful access. But the late Kekewich J. distinctly held that, even without any such inference, the right to forbid the textual publication of a letter does not extend to restrain the use of information contained in that letter and not of a confidential character; and that it is not for the Court to presume without evidence that any breach of confidence is intended or likely. The decision is, if we may say so, not only correct but wholesome, and we trust it may prove a check on a kind of extravagant pretensions which has become too common.

The result of *Re Orlebar* [1908] 1 Ch. 136 is that we have an equal division of judicial opinion upon the question whether, where personal property is appointed by will in exercise of a general testamentary power, estate duty is payable out of the appointed fund (so held by the late Kekewich J., the late Byrne J., and Warrington J.) or out of the testator's general personal estate (so held by Buckley J., now L. J., Swinfen Eady J., and in the present case Neville J.). No general principle of law is involved, as the difficulty turns on the construction of the ambiguous words 'passing to the executor as such' in the Finance Act, 1894. It seems highly desirable that the doubt, which must cause great inconvenience in the administration of estates, should be resolved by the Court of Appeal.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE INFLUENCE OF NATIONAL CHARACTER AND HISTORICAL ENVIRONMENT ON THE DEVELOPMENT OF THE COMMON LAW[1].

Mr. President, Members of the American Bar Association, Ladies and Gentlemen:

THERE are many eminent students of legal history in the United States, who would have been more competent to deal with the subject which I have chosen than I am, and if it was part of the policy of your Association to take this opportunity of paying an honour to the Old Country by asking some Englishman to deliver an address upon this subject, then among Englishmen there are some who would have been far more competent to deal with it than I am. I see two of them here present, and I feel that I owe an apology to you and to them for presuming to speak upon this subject in the presence of Sir Frederick Pollock, who is the author —the joint author, with the late lamented Professor Maitland—of the best general history of English law that has ever been published, and also my friend, Sir Kenelm Digby, whose treatise on the History of the Law of Real Property has, as you know, long been a standard authority.

However, you have done me the great honour of asking me to address you at this annual meeting and I must endeavour to acquit myself of the difficult task as well as I can, attempting to cover a large subject in a few minutes. Fortunately, it is a subject which has a like interest for you and for Englishmen.

Not long ago I had occasion to read an opinion rendered on a point of law by an eminent legal practitioner in a Spanish-American country. The point itself, on which the opinion was given, was one which might have arisen equally well upon the common law as upon the Spanish-American law, but the way of approaching it and dealing with it, the form of thought and the forms of expression, were curiously unlike those which one would have found in a legal opinion rendered either by a United States lawyer or by a lawyer in England. Now, that difference seemed to me to point to some inherent difference in the way of looking at and of treating legal questions. I dare say that many of you, in the course of

[1] The Annual Address before the American Bar Association, delivered at Portland, Maine, August 28, 1907.

your professional life, may have had a similar experience, and I dare say that you have been led to ask, as I was, What is the cause of this difference between the legal ideas and the legal methods of those of us who have been reared in the common law and of those who live and practise in continental Europe, or in Spanish America.

Now, the causes of that difference lie very far back in the past. A similar difference might have been noted even in the seventeenth century, and perhaps it might in some way have been more striking than it is at this moment. Two hundred years ago, long before the year 1776—and even, perhaps, further, before the foundation of the American Colonies—the law of England had acquired a distinctive quality, and that quality has remained distinctive, both here and in England, until now, although the substantive provisions of the law have been largely altered, as they must needs be, in two countries whose economic and social conditions have been changing so rapidly as they have changed both here and in England.

Therefore, we may still in truth say, that the Common Law is a common possession of the United States and of England because that spirit and those tendencies and those mental habits which belonged to the English stock when it was still undivided have been preserved until now. The causes which produce those habits and tendencies belong to a period long anterior to 1776, a period when the ancestors of Chief Justice Marshall and Chancellor Kent, of Story, Taney, Webster and Curtis were living in English villages, side by side with the ancestors of Coke, Hale, Holt, Hardwick, Blackstone, Eldon and the other sages who adorn the English roll of legal fame. These causes were at work far back in the Middle Ages. Just as the character of an individual man forms itself before he attains manhood, though the circumstances of his life modify his character, and though they reveal it to others, so in those early mediaeval centuries of which I speak were developed that set of ideas and that type of mind which took shape in the provisions and the procedure of the ancient law of England. The substance of those provisions was partly general, such as must exist in every organized and civilized society; partly special, such as the particular conditions of the country and the time required.

The form—as opposed to the substance—was due to the lawyers and judges, to writers and practitioners, although this form has, in point of fact, greatly affected the substance, so that when we study the growth of the Common Law we must think not only of the rules of inheritance, the doctrine of consideration for a contract, the definition of felony, we must also think of the jury and of the forms of actions. All these things were well settled before the first English colonist landed on the shores of Virginia and Massachusetts.

Now, what is it that a skilled observer would select as being the peculiar and characteristic notes of the Common Law? I think he would begin by saying that the most characteristic of them was the firm grasp which it has of the rights of the individual citizen. The citizen is conceived of, he is dealt with, as being a centre of force, an active atom, a person in whom there inhere certain powers and capacities which he is entitled to assert and make effective, not only against other citizens, but against all citizens taken together, that is to say, against the community and the State itself and its organ, the Executive Government.

Secondly, our observer would note as another characteristic feature, the recognition by the Common Law of the State and the Executive as clothed with the authority of the whole community, as being an effective power, entitled to require and compel the obedience of the community wherever and whenever the State does not trespass on the rights which are legally secured to an individual. To be effective, law must not only have executive force behind it, but also the principle of legitimate authority, the sense in every community that individual authority has its limits, and can be exerted only within the sphere allotted to it. Liberty is the child of Law. It is not his own pleasure, but rather the fact that the community has recognized a certain sphere of unchecked action as belonging to him, within which he can do as he pleases, that secures to the individual citizen his rights. Outside that sphere he must not only obey, but must co-operate with the executive. It is his duty to aid in preventing a crime, in suppressing disorder and in arresting an offender. A sheriff, in the due exercise of his functions, can call on all persons present to support him, and they are bound to support him, and this doctrine is a wholesome doctrine, and, if you like so to call it, it is a democratic doctrine, because it expresses the sense that the whole community is behind the law.

Now, these two principles go together. The first principle, the recognition of the rights of the individual citizen, is the safeguard against Tyranny, that is the absolute and capricious will of the governing power. The other principle is the safeguard against Anarchy, i. e. against that unrestrained and unlimited exercise of the will of the citizen which must result in collision and disorder.

Now, it may be suggested that these two principles were not peculiar to the Common Law, because no law could grow up and no state could prosper without both of them. That is perfectly true. But there have been systems of law in which sometimes the one principle and sometimes the other was imperfectly developed,

and, so to speak, overweighted by the other. The former principle, especially that of the recognition of the rights of the individual, has often been too feebly supplied to secure due protection to the citizen. It is the clearness with which both principles are alike recognized and the fullness with which both have been alike developed in the many phases through which the Common Law has passed that constitute its highest merit.

From the equal recognition of these two principles there follows a third characteristic. If principles apparently antagonistic are to be reconciled, there must be a precise delimitation of their respective bounds and limits. The law must be definite and exact. Now, precision, definiteness, exactitude, are features of the Common Law so conspicuous that the unlearned laity—of whom there are perhaps some present to-day—have often thought that they have been developed to an inordinate degree. They have made the law, not only very minute, but very technical.

With the love of precision there naturally goes a love of certainty and fixity. The spirit of the Common Law is a conservative spirit, which stands upon what exists, distrusting change, and refusing change until change has obviously become necessary. There is a dictum familiar to the profession in England which says: 'It is better that the law should be certain than that the law should be just.' That is a dictum which one cannot expect the laity to appreciate as lawyers may. But there is a truth in it.

The respect for what has been settled, with the desire that what has been settled should be definite in its terms, imports a deference to precedent. No legal system, not even the Mussulman law, based on the interpretation of the Koran and the traditions, has ever gone so far as the Common Law does in basing itself upon cases judicially determined and recorded. Now, judicial decisions are given and legal precedents made as events bring them. There is no order among them, except a chronological order, and therefore, a law constructed out of them is necessarily wanting in symmetry. The Common Law is admittedly unsymmetrical. Some people might call it confused, however exact may be the propositions that compose it. There are general principles running through it, but these are often hard to follow, so numerous are the exceptions. There are inconsistencies in the Common Law, where decisions have been given at different times and have not been settled by the highest Court of Appeal or by the Legislature. There are gaps in it. Thus there has been formed a tendency among lawyers to rate principles, or, at any rate, let us say, philosophical and logical views of the law, very low compared with any positive declaration made by a Court.

The old maxim that 'An ounce of precedent is worth a pound of principle,' still expresses the attitude of the profession in England, and very possibly may express it here also.

With the love of certainty and definiteness there naturally goes a respect for the forms of legal proceedings and for the precise verbal expression that has been given to legal rules. This is a quality which belongs to most legal systems in their earlier stages. In the Common Law it held its ground with great pertinacity until very recently, both in England and here; nor am I sure that it is not now still strong in some of your States, possibly stronger than in the England of to-day, in which, especially since the Judicature Act of 1873, the distinctions between forms of action are beginning to be forgotten.

You may think that among the features that characterize the Common Law I ought to name the love of justice and also the fondness for subtle distinctions. I do not, however, dwell upon these. I do not dwell upon the latter of them, because the love of subtleties belongs to all legal systems, and is perhaps more conspicuous in some other systems than in our own, the robust common sense of our ancestors not having allowed refinements to be carried beyond a certain point. 'Apices iuris non sunt iura' is at least as true in English as in Roman law. As respects the love of justice, it belongs to mankind generally and to all systems of law. Such differences as may be noted between different systems consist not in the reality of the wish to give every man his due, but in the self-control which prevents emotional impulses from over-riding justice, in the practical sense which perceives that to allow the forms of law to be neglected or unusually harsh treatment to be inflicted where a cause or a person happens to be unpopular, is really to injure the community by impairing the respect for the law itself and the confidence in its administration. Americans and Englishmen may claim that, although like others, they have sometimes lapsed from the right path, they have, on the whole, restrained their passions from trampling upon justice, and upon the regular methods of securing justice, better than most nations have done.

The foregoing characteristics of our Common Law are submitted for your consideration, not as the only ones which belong to it, for I might easily add others, but as being so broad and salient as to make it comparatively easy to discuss them and to endeavour to account for them. Some of them exist in other systems that have reached a high level of scientific development, being indeed qualities without which no system could be deemed excellent. But I can think of only one other system, that of the Roman Law,

which possesses them in so large a measure as to deserve comparison with our own.

Now, to what are we to ascribe these qualities that are distinctive of the Common Law? That is the question I propound for your consideration. The indwelling qualities of the race of men who built it up must have been a principal cause, and, indeed, the primary cause. One may perhaps say that the mind and character of a nation are more exactly and more adequately expressed in and through its law and its institutions than they are even through its literature and its art. Books and paintings are the work of individual men, many of whom have been greatly influenced by foreign ideas or foreign models, and some of these may have been powerful enough to influence their successors, but may not have been typical representatives of the national genius. But laws and customs are the work of a nation as a whole. They are indeed held binding and put in force by the ruling class, and they are shaped in their details by the professional class, but they are created by other classes also, because the rules which govern the ordinary citizens must be such as are fit to express the wishes of the ordinary citizen, being in harmony with his feelings, and adapted to the needs of his daily life. They are the offspring of Custom, and Custom is the child of the people. Thus it is not only the constructive intellect of the educated and professional class, but also the half-conscious thought of the average man which go to the making and moulding of the law.

We must, however, remember that law is not the product of one or two generations only, but of many generations. National character is always insensibly changing, and it changes the more rapidly the more advanced in civilization the nation becomes, the greater its vicissitudes, and the more constant its intercourse with other nations. Hence, institutions become the expression not solely of those original gifts and tendencies of a race of people which we observe when it emerges from prehistoric darkness. Time and circumstance co-operate in the work. Law is the result of the events which mould a nation as well as of the mental and moral qualities with which the nation started on its career. These two qualities are so blent and mixed in their working that it is hard to describe them separately. Nevertheless, we must try. Let us, therefore, begin by a brief glance at the inborn talents and temper of the race that produced the Common Law, and then let us see how the course of history trained their powers and guided their action.

All the Teutonic peoples were strong, resolute, even wilful; and the Low Germans and Northmen were the most active and forceful

branches of the Teutonic stock. Every man knew his rights and was ready to assert them by sword and axe. Not only so; he was also ready, where society had become advanced enough for courts to grow up, to assert his rights by the law also. Read the Icelandic sagas, in which records of killings and of lawsuits are mingled in about equal proportions, if you wish to realize how keen was the sense that every freeman had of his own rights, and how resolute he was in enforcing them. Never was there a people more fond of legal strife than were the Norwegians and Danes, who spread themselves over Eastern Britain in the ninth and tenth centuries, or than their brethren whom Rolf Ganger led to the conquest of the Northern coast of France in the ninth century. The Norman peasant is proverbial to-day in France for his litigiousness.

In this Teutonic self-assertiveness, however, there is no disregard of duly constituted authority. The primitive Teuton had his Folk Mot in England, his Thing in Norway and Iceland. He was loyal to his chief or his king. He felt his duty to the community wherein he lived. He did not always obey the law, but he respected the law, and saw the need of its enforcement.

It belongs to a strong race to have the power of self-control. Our forefathers were fierce and passionate men like other half-civilized peoples, but they had this power of self-control, and they restrained themselves from overriding the process of law and letting passion work injustice many a time when men of other races, Greeks or Slavs or Celts, would have yielded to their impulses. So, too, they had a latent solidity and steadiness which indisposed them to frequent or fitful change. Compared with their Slavonic neighbours to the east and their Celtic neighbours to the west, both quite as intellectually quick and perhaps more susceptible, the Teutons have always been of a conservative temper. This may be a mark of good sense and patience, or it may be an attribute of dogged and slow-moving minds. Anyhow, there it is, and for the purposes of law building, it is a merit of the first magnitude.

Further, the mediaeval English mind was of a practical rather than of a speculative type. It had plenty of acumen, plenty of logical vigour, but it did not run to the spinning of theories or the trying of experiments. This has been characteristic, more or less, of the English and American mind, and I may add also of the Low German or Dutch mind, ever since the Middle Ages, as compared with the Scotch mind and with our brethren, the High Germans of the European continent. For the purposes of law building, it is by no means an undesirable trait. Speaking to an American audience, no one would venture to disparage ingenuity. The jurist needs it daily. But the jurist who is practising law needs caution

and practical judgment even more; and with all of your American ingenuity, it has never been your way to run ahead of the time or to pull up the plant in order to see whether its roots are sprouting.

Here, then, I have given you five characteristics of the men to whom we owe the Common Law. They were strong men and pugnacious men; they respected authority; they could at need control their impulses; they were not given to change; they were not fertile in theory or invention. With these qualities they started on the work of making a law. Now, how did the conditions of England from the twelfth to the eighteenth century affect them, and so guide their action as to bring out the legal product which we have inherited, a fruit very different from that which has ripened under the sun of Germany or of France?

The English king in the Middle Ages was strong, stronger than the kings of France or Castile or Aragon. He was, from the days of Henry II onwards, effective master—except for brief intervals—of his whole realm. He was able to make his executive authority feared, even if it was sometimes disobeyed. His writ ran everywhere; his judges travelling through the country brought the law to the sight of all men. His aim and that of his judges was, during the thirteenth and fourteenth centuries, to build up one law, instead of the variety of diverse legal customs such as had grown up in continental Europe. Thus he and they must needs strive to make the law clear and certain. Such it became. Here and there, as in Kent and in some old boroughs, local land customs survived, yet not enough to mar the unity and definiteness of the law as a whole.

From good motives as well as bad, the king was tempted to stretch his authority and make himself almost a despot. He was so strong over against the barons that they were obliged from time to time to ally themselves with the Church—usually their antagonist—and also with the middle class, consisting of small landholders and burghers. To that alliance of the nobles with the Church and the upper part of the middle class we owe Magna Charta and the long line of restrictions thereafter imposed on arbitrary government, including the great *Confirmatio Chartarum* which followed upon the Magna Charta itself. Now, Magna Charta is the declaration of one generally binding law. It enounces and it consecrates and it is itself *Lex Terrae*, the law of the whole land, and of all persons therein. It is for us of the English stock the parent of all instruments defining the relation of citizen and sovereign. It is the ancestor of your own Federal Constitution, as well as of the 'Bill of Rights' provisions of all State constitutions.

Just as the barons and the people were obliged to base themselves

upon the solemnly made engagements of the Crown as the evidence of their immunities, so the Crown, acting through its judges, not being strong enough to make its own policy or view of what was right prevail as a mere exercise of the sovereign's own will, and desiring to have some positive authority to set against the texts which were quoted from the imperial or papal law by the civilians or the Canonists, was forced to rely upon acts previously done, decisions previously delivered, and to found the law upon it. Thus both the judges on one hand, and those representing the people on the other, were led to appeal to and lay stress upon precedents. Under these conditions, and favoured by them, there grew up that habit of recording and following cases adjudicated upon which is so eminently and uniquely characteristic of the Common Law.

The balance of forces in English mediaeval society appeared most clearly in the relations of lord and vassal. Each of these had rights, and those rights were apt to come into conflict. The adjustment of conflicting claims gave constant occupation to the lawyers and the judges, and while forming habits of exact thought and precise statement, it created a great mass of technical learning. The older English land law was as intricate and elaborately artificial a body of rules as the world has ever seen, and although modified in some important points, it lasted with us down to a century ago, when it began to be so cut about by amending statutes as to lose its ancient logical cohesion. For some reason or other which is not very clear to most of us, many of its technical doctrines were held to be not applicable to land in America, so you have escaped most of the complications it handed down to us. But the circumstances and the process which produced the ancient land law left a deep impress upon the law in general. Some of the faults, some also of the merits, of the Anglo-American way of handling legal questions may be traced to the methods followed in trying issues relating to the land rights of the elder time.

English freedom, in the particular legal form which it took, sprang out of feudal conditions. In reality it was older than feudality, and lost some of its simple Teutonic breadth when overgrown by feudal notions. But the structure of Parliament, and the right of Parliament alone to impose taxes, sprang out of the relation of the king, as feudal lord to his tenants, which is, in a certain sense, a private relation as well as a political one. It is hardly too much to say that what we call the public or constitutional law of England is a part of, as it has certainly grown out of, the private law. Some of our fundamental constitutional principles have been established by decisions given in private suits, and although you Americans can draw a sharper line between public and constitu-

tional law than we can draw in England, because you have a written or Rigid Constitution, and we have not got a Constitution (in your sense) at all, still the old character of the Common Law remains plainly visible in the fact that many of the most important questions that have arisen on the construction of your Constitutions in this country have arisen in suits between private parties, where the primary issue before the Court was one in which the rights of those parties had to be determined.

I have referred to exactitude of thought and expression as one of the excellencies which we justly admire in the sages of the Common Law, and particularly in the deliverances of the judges. That exactitude has become a feature of all our legal thinking and legal writing, and has in particular made us separate more clearly than the lawyers of some other nations do strictly legal considerations from those which belong to the sphere of morality or sentiment. We owe it in no small measure to the system of pleading which, slowly matured and refined to a perhaps excessive point of technicality, gave to the intellects of many generations of lawyers a very sharp edge. The old system of pleading had the great merit of impressing upon them the need for distinguishing issues of law from issues of fact. The first lesson a student learns is to consider in any given case whether he ought to plead or to demur. It is a lesson of value to all of us in our daily life.

Half the confusions of thought in the world, not excepting the world of political discussion, have arisen because men have not stopped to ask themselves whether the issue they are debating is one of fact or of principle. 'Do I deny the facts or do I dispute the inference?' Or in legal words, 'Ought I to plead or to demur?'

It is a remarkable fact that although the Common Law came into existence at a time when personal slavery was not extinct in England, and had reached an advanced state of development before praedial slavery or Villenage had died out, the existence of slavery in the North American colonies had nothing to do with either English institution, but arose quite independently in colonial days. Though Villenage existed at Common Law, and is said to have lasted into the seventeenth century, personal slavery does not, I think, stand recorded in any Common Law book of authority, and it may be supposed that the incidents of negro slavery in the colonies, though doubtless largely assumed as matter of custom, were either parts of the general Common Law of personal property or else rested upon statutes of those colonies in which slavery existed. It may be observed in passing that, although one might think that the recognition of the rights of man as man would be clearest and fullest in a country where every man was free, this

may not in fact have been the case. Where some men are free and others are slaves, the status of freedom may have been conceived more sharply as a positive status, and the rights belonging to the individual as a free man may have stood out more strongly, because a free man is legally exempt from treatment to which a slave is liable. As a free man, he is prima facie the equal of all other free men, even though some of the latter may belong to a politically privileged caste. The history of the law of persons at Rome, where slavery was an extremely important institution and where the rights of individual citizens were very clearly recognized, lends colour to this view.

On no feature of the Common Law did your and our ancestors lay more stress than on the Jury, and the right of every citizen to be tried by his peers. This right had been a bulwark of English freedom, and was deemed in the eighteenth century to be essential thereto. Yet it deserves to be noticed that the jury was an institution which, in the form in which it is known to us, arose almost, one might say, by accident. The legal genius, or instinct, of the mediaeval English may be credited, however, with the use they made of this accident. Darwin has shown how a variation from a type which in its origin is accidental, that is to say, due to some cause operative in an individual organism which is beyond our powers of inquiry, may become the source of a new type, possessing advantages which enable that new type to survive and prevail and reach a higher level of efficiency than the original type possessed. Now, it may not be too fanciful to suggest that where a political or legal germ happens to fall in a fertile soil, the virtue of the soil enables it to spring up and become the parent of a flourishing progeny. Thus our ancestors moulded the jury into an instrument that was serviceable not only for discovering the truth, but also for securing freedom and justice—freedom because the jury was practically independent of royal power; justice, because, although it was sometimes intimidated and occasionally even corrupted, it was on the whole less liable to be tampered with by those malign influences which might poison the mind or pervert the action of a judge in days when public opinion was ill-formed or weak.

We in England have no longer that confidence in the wisdom of a jury in certain classes of civil actions which we once had, and the tendency in recent years has been to narrow the sphere of its employment. But the institution of the jury has had some notably beneficent results. Along with those rules of pleading to which I have already referred, it helped to form in us a keener perception of the need for separating issues of law from issues of fact than exists anywhere outside of England and America, and it has trained

us how to make this distinction in every case we have to advise on or to argue. It has tended to keep judicial deliverances of the law within due limits of brevity, because when a judge finds himself tempted to wander off into the merits of the case he is reminded that merits are for the jury, and that his natural human tendency to do what he thinks substantial justice must be restrained by the sense that his business is to declare the law and be content with advising the jury on the facts. It framed the practice of using, almost exclusively, oral evidence at a trial, and thus incidentally it prevented both those secret examinations of the accused person and that recourse to torture which were common in continental Europe. It confirmed the ancient usage of requiring judicial proceedings to be conducted in public, and thus kept subject to the watchful eye of popular opinion, and it mitigated that harshness of the penal law which belongs to all comparatively rude societies, and which was not removed from the English Statute Book until the memory of persons still living. When men were liable to be hanged for small thefts, English juries refused to convict for such offences, and their refusal hastened the march of legislative reforms.

The mention of penal matters suggests a word as to the extreme technicality of the older Common Law. Frequently as that technicality frustrated the doing of substantial justice in civil cases, it had its advantages in criminal proceedings. Often a prisoner who did not deserve a severe sentence—and no doubt also sometimes a prisoner who did—escaped on some technical ground. Our forefathers had such a respect for the law that they would rather a guilty man should escape punishment than that some of their technicalities were neglected. Perhaps they carried that principle almost a little too far.

The Common Law, which had the great merit of forbidding the use of torture—abominably frequent in continental Europe even in the eighteenth century—had also the merit of forming in the legal profession the feeling that an accused person ought to have a fair run for life or freedom. A sportsmanlike instinct grew up, like that which gives the hunted deer 'law' or a fair start, or the instinct which forbids certain tricks by which a game of cricket might be won. A judge who bullied a prisoner was condemned by professional opinion. A prosecuting counsel who overstated his case or betrayed a personal eagerness to convict the prisoner, incurred the displeasure of his brethren, and was sure to hear of it afterwards.

I have often been struck in our criminal courts—and the same thing doubtless happens here—by the self-restraint which experienced counsel impose on themselves when conducting a case, as well

as by the care which the judge takes to let the prisoner have the benefit of everything in his favour. How different things are in continental Europe is known to you all. It is partly because this old tradition has been so well preserved that we in England have found that comparatively few convicted prisoners need opportunities for raising points of law after the trial. The trial itself almost always secures for them whatever justice requires, though of course there is a power of bringing forward for subsequent argument points reserved, and we have recently, in the parliamentary session just closed, instituted a Court which is to hear criminal cases on appeal.

The mediaeval Common Law has been charged with one serious defect, that of lacking elasticity and the power of expansion. It halted at a certain point. It refused to deal, or rather, perhaps I should say, its machinery proved incapable of dealing, with certain sets of cases, and left them to be taken up and dealt with by the Crown, acting through the Lord Chancellor. I cannot stop to inquire how far this was due to an excess of conservatism in our forefathers, how far to the circumstances of the time which, while circumscribing the action of the king through one set of machinery, left him free to act through another. Anyhow, the result was that the huge system which we call Equity grew up side by side with the Common Law, remained distinct from it in England until the Judicature Act of 1873, and I believe still remains distinct from the Common Law in some of your States. In a broad sense, although, speaking technically, we distinguish Common Law from Equity, we may include Equity within the term Common Law when we use it to distinguish the law of England and America from the Roman Law of the European continent, or of Louisiana and Spanish America. And it must not be forgotten that not only had Equity become a thoroughly positive system and a technical system by the time when the North American colonies were founded, but also that it had been largely influenced by the same historical environment and had been moulded by the same national character as had governed the growth of the law administered in the Common Law Courts. How much of its own precision and certainty the older system had given to the younger system may be perceived by whoever will compare English Equity with the civil law of most European countries in the seventeenth century.

I have kept to the last the most striking of all the historical conditions which determined the character of Anglo-American law. England was an island. The influences which governed the development of law in the mainland reached her in an attenuated form. The English people had a chance of making a new start and of

creating a system of law for themselves, instead of merely adopting or adapting the Roman jurisprudence, as did at various times and in divers ways nearly all modern peoples except those of English stock.

We must not indeed exaggerate the originality of our Law. It was not as original as that of Iceland would probably have been had Iceland gone on developing the legal customs she had formed by the middle of the thirteenth century. It is not original in the sense of owing little or nothing to foreign sources, for a great deal of law flowed from Roman fountains into the English stream. When the Lombard Vacarius taught the Roman Law in the reign of King Stephen at Oxford—this is among the very first traces we have of that famous university—we cannot suppose that his hearers were confined to those who wished to practise in the Ecclesiastical Courts. In the next century we find Bracton, one of our earliest legal writers, copying freely from the Roman law books, though he frequently also contradicts them when English usage differed. In the fourteenth and fifteenth centuries, the ecclesiastical chancellors, who built up the system of Equity, were much influenced by Roman legal doctrines, drawn largely through Canonist channels. Still the fact remains that the law of England was a new creation, not an adaptation of the law of the Empire. It has a character and a quality which are all its own; and its free spirit and tendencies have always stood out in marked contrast to the despotic spirit and tendencies which France, Spain, and Germany inherited from the imperial jurisprudence. To that jurisprudence it was, during the Middle Ages and the centuries which followed, as much superior in respect of freedom and in what may be called a popular flavour as it was inferior in philosophic breadth and elegance to the ancient sources on which that imperial jurisprudence was founded. The use of the jury, the far larger part assigned to oral evidence, the sharper separation of issues of law from issues of fact, are among the most salient points in which the superiority of the Common Law to the law of continental Europe appears.

I had intended to have given you a brief sketch of the earlier history of the ancient Roman Law for the sake of showing how the characteristics of that great rival system sprang from features in the national character of the Romans in their republican days, not unlike those which marked our own ancestors. They too had a genius for law. Less imaginative, less artistic, less acute in speculation, altogether less intellectually versatile and alert than were the Greeks, they had a greater capacity for building up and bringing to an almost finished and certainly unsurpassed perfection, a body of legal principles and rules. They had this capacity in respect of gifts

like those of our ancestors. They realized clearly the rights of the individual as against the state. They were conservative. They had the power of self-control. They were filled with practical good sense.

But this subject is too great to be dealt with at the end of an address, and I must be content with recommending it to the attention of those who are interested in the study as throwing much light upon the general tendencies which have governed the growth of law. The best illustrations of English legal history are to be found in Roman legal history.

So far I have spoken of the Common Law as a product of the English intellect under certain peculiar historical conditions; but one word must be said of it in another aspect: If it was a result, it was also a cause. It reacted powerfully upon the people that made it. Just as the habit of physical or mental exercise strengthens the body or the mind where native energy has made exercise enjoyable, so the Common Law, once created, began to develop further and give more definite form to those very qualities of the nation whereto its own features were due. Under its influence the national mind became more and more permeated by the spirit of Legality. It grew accustomed to resist arbitrary power, but as it did this in defence of prescriptive right, it did not lapse into revolutionary ways. Thus there was formed the idea of a government of limited powers and the habit, when any one claimed obedience, of requiring him to show his title to demand it. If it be asked why should not such a conception of the legal character of all authority belong to and arise in every duly matured system of law, the answer must be that the case of England stood alone in this respect—that the law came early to be recognized as being something more than an expression of the will of the sovereign ruler. It sprang partly out of the old customs, partly from an assembly which was national, although not as yet popular. It did not descend, as in continental Europe, from an ancient and foreign wisdom or authority. It was English. It came not from above, but from all around. In England, moreover, the men who knew and practised the law were largely persons of some independent social standing. There were among them not a few of the lesser landholders, and of the younger sons or nephews of some of the larger landholders. They were a link between the nobles and the middle classes. Unlike the lawyers of France, those of England did not generally depend on the Crown. Some no doubt did, and served the Crown in ways which the best opinion of their time condemned. But on the whole they were independent of the Crown and were ready on occasion to oppose it. Thus it came about that although the people

at large knew little of the details of the law, the spirit of independent legality was diffused through the nation, and it was not the docile servant of power as it became in countries where both physical force and the function of making or declaring the law lay in the hands of the executive ruler.

How great a part the conception of the legal rights of the subject or citizen against the Crown or the State power has played in English and in American history is known to you all. Still less need I dwell on the capital importance for the whole political system of the United States of that doctrine of Limited Powers which has been so admirably worked out in your constitution, nor of that respect for a defined legal right which supports their provisions. The life of every nation rests mainly on what may be called its fixed ideas, those ideas which have become axioms in the mind of every citizen. They are stronger than fundamental laws, because it is they that give to fundamental laws their strength. They are, as the poet says, 'the hidden bases of the hills.' Now, it was mainly by the Common Law that those fixed and fundamental ideas were moulded whereupon the constitutional freedom of America, as of England, rests.

One hundred and thirty-one years have now passed since the majestic current of the Common Law became divided into two streams which have ever since flowed in distinct channels. Water is naturally affected by the rock over or the soil through which it flows; but these two streams, separated in 1776, have hitherto preserved almost the same tint and almost the same flavour. Many statutes have been enacted in England since that year, and many more have been enacted here, but the broad character of the Common Law remains essentially the same, and it forms the same mental habits in those who study and practise it. An American counsel in an English Court, or an English counsel in an American Court, feels himself in a familiar atmosphere, and understands what is going on and why it is going on, because he is to the manner born. We read and we quote your law reports, although we are sometimes embarrassed by the enormous quantity of the food, not all of it, equally nutritious, but some of it most nutritious, which you annually present to our appetite. So you quote our Law Reports, although they are nowadays so largely filled by decisions upon recent statutes as to be less serviceable for the elucidation of the Common Law than they at one time were. In nothing, perhaps, does the substantial identity of the two branches of the old stock appear so much as in the doctrine and practice of the law. It is a bond of union and of sympathy whose value can hardly be overrated. An English visitor who as himself been

trained to the law can find few keener pleasures than that which my friends Lord Justice Kennedy, Sir Kenelm Digby, Sir Frederick Pollock and I enjoy in being here to-day among so many eminent members of our own profession, and in perceiving how high and respected a place the legal profession holds, and always has held, and I trust always will hold, in the United States.

It is a bond of sympathy, not least because it is a source of common pride. There is nothing of which you and we may be more justly proud than that our common forefathers reared this majestic fabric which has given shelter to so many generations of men and from which there have gone forth principles of liberty by which the whole world has profited. The law of a nation is not only the expression of its character, but a main factor in its greatness. What the bony skeleton is to the body, what her steel ribs are to the ship, that to a state is its law, holding all the parts fitly joined together so that each may retain its proper place and discharge its proper functions. The Common Law has done this for you and for us in such wise as to have helped to form the mind and habits as well of the individual citizen as of the whole nation. Parts of the law the individual citizens cannot understand, and when that is so they had better not try to understand it, but have recourse to your professional advice. But the law is all their own; the people can remould it if they will. Where a system of law has been made by the people and for the people, where it conforms to their sentiment and breathes their spirit, it deserves and receives the confidence of the people. So may it ever be both in America and in England.

JAMES BRYCE.

THE LAND TRANSFER ACTS.

THERE seems at last to be some hope of an inquiry being held as to the working of the Land Transfer Acts, and this prospect gives additional interest to the 'Observations' recently published by the Law Society in answer to the report of Mr. Brickdale, issued in 1906, on the operations of the Land Registry during the preceding four years. The 'Observations' have been prepared with great care and ability, and must have considerable weight in deciding what ought to be done to improve the existing state of affairs.

The main objections which the Law Society urge against the system of registration introduced by the Land Transfer Act, 1897, are, that it adds to the expense of transferring land; that it is too complicated; and that registration with possessory title is a delusion and a snare.

The first objection is undoubtedly well founded. A purchaser of unregistered land in a compulsory district has to pay a double set of expenses; he has to pay the same amount in the shape of lawyers' costs for investigating title, and for the preparation and execution of the conveyance, &c. as if the new system did not exist, and in addition he has to pay a substantial sum in the shape of registration fees. In the case of registration with possessory title (and all but a small percentage of new registrations belong to this class) the imposition of heavy registration fees is quite inconsistent with the theory which underlies the Registrar's Report, namely that the principal justification for the system of registration with possessory title is that it will at some indefinite time hereafter confer a great benefit on the community: this is a tacit admission that it does not confer any appreciable benefit on the first registered proprietor. Why then should he be compelled to pay a heavy fee for something which he does not want, and which does him no good? The answer is that the Treasury has so decreed.

The same objection applies, in a lesser degree, to every transfer, lease or mortgage of land registered with a possessory title.

The second objection—that the system is too complicated—is equally well founded. It is sometimes said that the transfer of land ought to be as simple as the transfer of stock, and although this is only possible up to a certain point, yet it is useful to keep the system of transferring stock before our minds, as an ideal which we should seek to attain. Judged by this ideal the system introduced by the Land Transfer Act, 1897, is not a success. There are

three kinds of registered title to freeholds, and three kinds of registered title to leaseholds, and in addition the legal estate in registered land may be dealt with by unregistered assurances. The registered title is also liable to be incumbered with restrictions, a sample of which may be taken from Mr. Brickdale's work on the Land Transfer Acts. It is given to illustrate an imaginary case of registered land belonging to John Black and James Black in equal shares. John Black is supposed to have made a strict settlement of his share, under which he is tenant for life, and W. Jones and H. Brown are the trustees. James Black has conveyed his share to Thomas May and George Johnson upon trust for sale, with the consent of himself and his wife or the survivor. Here are the restrictions[1]:—'Restriction as to the half share of John Black. Until further order no transfer of the land is to be made except on sale or exchange, and the purchase moneys on sale are to be paid to William Jones and Henry Brown, or into court, and no charge is to be created without the consent of the said W. Jones and H. Brown. Restriction as to the half share of Thomas May and George Johnson. Until further order no transfer or charge is to be registered during the lives of James Black and Sophia Black his wife and of the survivor without their respective consents in writing.' As to John Black's share, the effect of the restriction is that when he dies, or when he and his son join in a disentailing deed and resettlement, or when the settlement comes to an end, the parties will have to come to the Registrar and ask him to be good enough to make the necessary alterations in the register. In other words, the Land Registry is being converted into a Landed Estates Court, of which the Registrar is the self-appointed judge.

Nor is this all. It appears from Mr. Hogg's recently published collection of Precedents for Registered Land that attempts are to be made, with the Registrar's sanction, to carry out settlements of land by means of a number of registered instruments creating particular estates, remainders, annuities by way of jointure, &c. It is to be hoped that these attempts will not be allowed to succeed, for they are quite contrary to the spirit and intention of the Land Transfer Acts[2].

[1] Fully to appreciate these restrictions the reader should refer to the 'Proprietorship Register,' with its erasures and interlineations, as printed in Mr. Brickdale's book (p. 631). The land certificate would contain a transcript of these entries, erasures, and interlineations. Surely the practice of the Land Registry in issuing land certificates in this form is calculated to encourage forgeries and other frauds. Mr. Brickdale's 'person of ordinary business capacity,' whose acquaintance we shall (in imagination) make presently, would certainly not approve of it. He would prefer a certificate in the form of an ordinary stock certificate, which cannot easily be tampered with.

[2] The objections to Mr. Hogg's ingenious devices are ably pointed out in a notice of Mr. Hogg's work in this REVIEW for April last. Fortunately no solicitor of any experience is likely to advise his clients to adopt them.

It is clear that neither Lord Selborne nor Lord Cairns would approve of the manner in which the Land Registry requires settled land to be dealt with. Their object in establishing a Land Registry was not to create a government office for transacting conveyancing business[1], still less a Landed Estates Court: their object was to simplify the transfer of land as between vendor and purchaser, by making the title to land and its transfer follow as closely as possible the analogy of stock. In the case of stock, it is hardly necessary to say, there is no question of absolute, qualified, or possessory titles: there is only one kind of title, and no restrictions can be entered on the register. When an owner of stock wishes to settle it on his marriage he transfers it into the names of trustees, and all the trusts are declared by a document off the register. Lord Selborne and Lord Cairns intended that their system of registration of title to land should be conducted on the same principle. If a system of this kind were in force, settled land, whether under a strict settlement or a settlement by way of trust for sale, would be registered in the names of trustees, and would remain so registered until it was sold or the settlement came to an end. The original settlement and all disentailing deeds, resettlements, appointments, and other instruments modifying it would take effect in equity only and would not appear on the register; if it were necessary to create legal interests for the purpose of securing jointures, raising portions, &c., or if the tenant for life desired to sell or lease under the Settled Land Acts, the trustees would be bound to do what was necessary, but purchasers, lessees and mortgagees would have nothing to do with the complications of the settlement: they would deal with the trustees as absolute owners; and if the beneficiaries desired to dispose of the land in accordance with their rights, they would merely have to deal with the trustees; they would not have to go on bended knees to the Registrar.

The existing system of transferring registered land is also open to criticism. The Registrar tells us that in the case of registered

[1] The danger of allowing so difficult a business as conveyancing to be transacted by a public office is illustrated by a form given in Mr. Brickdale's book (p. 590), which has no doubt been approved by the Registrar: it is a transfer of part of the land comprised in a registered title, reserving an easement over the unsold part: the reservation runs as follows:—'Reserving to myself and the registered proprietor for the time being of the title above referred to a right of drainage through the pipe marked *X Y* on the accompanying plan, &c.' Now if this is the proper way of creating an easement *de novo*, conveyancers have for generations laboured under two delusions, for it has hitherto been assumed, first, that an easement created *de novo* is not a matter of reservation, but a matter of re-grant, and secondly, that proper words of limitation are necessary to create an easement in fee. In addition to this objection, the proposed mode of giving the transferor an easement has the inconvenience that he will have no title deed, for the transfer will be put away in the pigeon-holes of the Land Registry, and if he wishes to have it produced he will be put to some trouble and expense.

land 'the highly technical and, to the layman, often barely intelligible "conveyance"' is 'superseded by a simple and clearly expressed instrument of transfer in an official form,' which 'can be purchased for a penny at any stationer's.' 'These forms,' he tells us, 'avoid the use of technical phrases, and enable any person of ordinary business capacity to see clearly what he is doing when he executes a deed.' In answer to this the Law Society rightly draw attention to the form of transfer, with the additions sanctioned by the Registrar, which is printed in Mr. Brickdale's book. This form contains a statement that the transferor is 'seised in fee simple'; he transfers 'as beneficial owner' to the transferee 'in fee simple' the land comprised in the title, 'together with the appurtenant easements and other rights described in the First Schedule hereto, and subject to the reservations and exceptions contained in the Second Schedule hereto, and to the conditions specified in the Third Schedule hereto'; the form also contains an application for the registration of such of the said rights, easements, &c. as are capable of registration, and an acknowledgment as to deeds, &c. by the transferor. Now let us take the imaginary title of John Black and James Black above referred to, and suppose that they have agreed to sell the land to 'a person of ordinary business capacity': and that the purchase money of John Black's share is to be paid into court. We buy an official form for a penny at the nearest stationer's, adapt it to the title, and to the restrictions set forth as above described, provide for payment into court of the purchase money of John Black's share, incorporate in the form the additions suggested by Mr. Brickdale, give it to the purchaser, and tell him that it is a 'short, simple, printed form' which 'avoids the use of technical phrases, and enables' him, being a 'person of ordinary business capacity, to see clearly what he is doing when he executes' it. His answer may be imagined.

The claims of the Registrar as to the effect of registration, and as to the value of the land certificate, must also be disallowed. He says that 'an intending purchaser of registered land has no need to make any private inquiry into the title, he merely sees that the person he is dealing with is the registered proprietor.' Considering that in all but a few cases 'proprietors' are registered with possessory titles, this is a most misleading statement, for a purchaser from such a registered proprietor ought to examine the title with as much care as if the land had never been registered. The Registrar goes on: 'A "land certificate," issued to the registered proprietor, gives him a portable counterpart of the register, and enables him to obtain a temporary loan from a banker by deposit. By these means the public obtains not only security from fraud, but also

immunity from the expense and delay which (as is only too well known) are incident to all dealings with land where the registration system does not exist.' This is the language of enthusiasm rather than of business. As a matter of fact, a land certificate, in the case of land registered with possessory title (and almost all compulsory registrations are of this kind) affords no proof of the holder's title. Cases, referred to in the Law Society's 'Observations,' have occurred in which persons without title have been registered as proprietors and have thus been able to hold themselves out to the world as owners of land. But quite apart from such cases as these, which are generally cases of fraud, it is obvious that the Land Transfer Acts offer opportunities for the issue of official documents which in the hands of careless or ignorant people may cause very serious mistakes; a person may be registered as a proprietor of land with possessory title when he has nothing but an equitable title, the legal estate being outstanding in a mortgagee or trustee, or the land may be subject to a long term of years, or to annuities, jointures, portions, or other charges: these essential matters do not appear on the register or the land certificate, and yet the land certificate in such a case is quite as flamboyant and imposing in its outward appearance as that issued to a proprietor registered with an absolute title. It is disquieting to learn from the Registrar's report that the possession of such a document 'enables the registered proprietor to obtain a temporary loan from a banker by deposit,' and that 'bankers who have had experience are already beginning to express their preference for the registry system in regard to these transactions.' It is to be feared that a rude awakening is in store for some of them.

A similar objection may be taken to the 'good leasehold title' which the Registrar is prepared to register in the name of any one who produces a document purporting to be a lease; it may have been granted by some one with an inadequate title, or no title at all, but that does not matter; the land certificate enables the lessee to hold himself out to the world as having a 'good leasehold title[1].'

[1] It is well known that when a speculative builder takes up his leases he often has them granted to his wife, who is really a trustee for him: the better opinion is that such leases are wholly void, and even if they were valid, the wife could not dispose of them: yet I am informed that the Registrar issues 'good leasehold title' certificates for leases of this description. Again, some years ago the Registrar issued an edict that no reversionary lease commencing more than twenty-one years from its date should be registered, on the ground that such leases contravene the Rule against Perpetuities, a question on which there is much diversity of opinion. It is believed that the interdict has been withdrawn, and that such a lease can now be registered with the usual consequence—a land certificate—although no judicial decision on the point above referred to has been obtained. These cases illustrate the danger of allowing a public official to pre-judge difficult questions of real property law. Complications of this kind would be avoided if leases were entered on the register as 'claims,' instead of being registered as rights of property: see *infra*, p. 38.

It is hardly necessary to say that the procedure which allows any one to register himself as proprietor of land whether he is entitled to it or not, and to hold himself out to the world as owner, with the sanction of the Royal Arms and the seal of the Land Registry, is quite contrary to the objects which Lord Selborne and Lord Cairns had in view when they originally decided to introduce a system of compulsory registration of title. Still less would they have approved of the very easy terms on which the Registrar is prepared to accept, as 'absolute,' titles which may or may not be good, or of his suggestion that the officials at the Land Registry should be empowered 'to make all registered titles absolute instead of possessory from the beginning.' That any responsible official should make such a wild suggestion as this is almost incredible.

So far as the criticisms of the Law Society are directed against the Land Registry and its methods, it is impossible for any disinterested person to deny their justice. But so far as they imply that the existing system of conveyancing in non-compulsory districts is satisfactory, the 'Observations' do not carry conviction. Such a conclusion is opposed to the opinion of Lord Cairns, Lord Selborne, and (it is safe to say) of every Royal Commission and Parliamentary Committee which has considered the subject during the last two centuries, and it is inconsistent with the attitude taken up by the Law Society itself not many years ago, for in 1898 they introduced into Parliament a bill, framed by Mr. Wolstenholme on their instructions, which not only by its provisions, but by the detailed explanatory memorandum which accompanied it, showed that, in the opinion of the Law Society and the eminent conveyancer whom they had consulted, a reform of some kind was urgently required. Nothing more has been heard of the bill, and the feeling of the Law Society seems now to be opposed to any radical reforms, if we may judge from the opening sentence of the 'Observations' on the Land Registry:

'Those who read [Mr. Brickdale's] Report and are capable of forming an opinion on the questions raised, cannot fail to be impressed with the loss the community sustained when Lord Cairns died without leaving behind him a successor, high in the councils of the government, who by training and experience was capable of carrying on the reform of the law of real property on the lines he so successfully laid down in the year 1881.'

This is no doubt intended to refer to the Solicitors' Remuneration Act, 1881, and the Conveyancing Act, 1881, and possibly to the Settled Land Act, 1882. The Solicitors' Remuneration Act comes first because it is the most important. The Settled Land Act is not

really relevant to the present discussion, because the reform which it introduced was political or social rather than legal: its object was to avert the popular demand for the abolition of entails and family settlements, which formerly tended to make land inalienable, and its provisions will remain in force whatever reforms are made in conveyancing and the law of real property. The Conveyancing Act, on the other hand, has had a far-reaching effect on the forms employed in conveyancing, but it is a mistake to suppose, as the Law Society seem to do, that this result is due to Lord Cairns's inventive genius, for the 'lines' on which the Conveyancing Act is framed had been laid down long before Lord Cairns attempted to grapple with the subject. The Statute 8 & 9 Vict. c. 119 (one of Lord Brougham's Acts) authorized the use of forms of conveyance in which certain short expressions had the same effect as full covenants for title and for the production of deeds, and Lord Cranworth's Act, passed in 1860, contains provisions which were intended to shorten settlements, mortgages and wills by making it unnecessary to insert in them various powers which are almost invariably required. In principle there is no difference between these statutes and the provisions to be found in the Conveyancing Act; indeed many of the latter are taken almost verbatim from Lord Cranworth's Act. The earlier Acts were failures, for the simple reason that under the system of charging fees for conveyancing work which was then in force, the adoption of these Acts would have caused serious loss to practitioners. Lord Cairns was shrewd enough to see that if his Conveyancing Act was to be a success he must make its adoption 'pay,' and he did so by passing the Solicitors' Remuneration Act, 1881. Let us see what the result is.

The system of conveyancing now in vogue, for which we are indebted to the combined operation of the Conveyancing Act and the Solicitors' Remuneration Act, may be described as a system of conveyancing by code-words, and it has two drawbacks. In the first place, code-words are as much liable to be used wrongly in conveyances as they are in telegrams, and most of us have known cases in which mistakes of this kind have occurred. Many of my readers will probably remember a collection of imaginary letters, published some years ago, which contains, among other good things, a description of the consternation produced on a certain occasion by the arrival of a telegram consisting of the code-word *annosus*, which, being interpreted, was found to mean, 'Twins both dead, mother not expected to live.' This message not being appropriate to the surrounding circumstances, the telegram was by request repeated, when it was found that the message should have

read *annumero*, meaning 'Book is not yet published.' Now mistakes in telegrams can generally be corrected at once at the expense of a few shillings, but mistakes in title deeds are sometimes not discovered until after the lapse of many years, when they can only be set right at considerable expense, if at all. Every conveyancer in the course of his arid labours has met with deeds intended to operate under the Conveyancing Act in which the proper code-words have been accidentally omitted altogether, or in which the wrong code-words have been used; voluntary deeds in which the grantor conveys 'as beneficial owner'; mortgages in which the grantor conveys simply 'as mortgagor,' &c. I have even seen a printed precedent in which an executor selling under the Land Transfer Act, 1897 (part I), was expressed to convey 'as real representative.' In each of these cases no covenants for title are implied, and the purchaser (or mortgagee) will certainly be put to inconvenience and possibly to loss.

The second objection to conveyancing by code-words is that it produces a delusive appearance of simplicity. In their criticisms on the 'short and simple forms' alleged by Mr. Brickdale to be available in dealing with registered land, the Law Society very justly point out that nothing is gained by trying to make a complicated transaction appear a simple one: 'It is absurd to treat "short" as synonymous with "clear."' The same criticism applies to the system of conveyancing by code-words. A cipher telegram, when translated, has the same meaning as a telegram written out in full, and a deed by which a person conveys or mortgages 'as beneficial owner,' although it is considerably shorter than an old-fashioned deed, is really no simpler.

The truth is that 'the reform of the law of real property' which Lord Cairns is supposed to have effected is little more than a superficial reform. It does not touch the real evils; they are too deeply rooted to be reached by such a device as making the words 'as beneficial owner' equivalent to lengthy covenants for title. The real evils arise partly from the fact that our law of real property is based on the obscure doctrines of seisin and tenure, which no practising lawyer really understands; partly from the fact that our system of conveyancing is based on the highly technical doctrine of uses; partly from the number of estates and interests, legal and equitable, into which the ownership of land may be split up; partly from the variety of technical 'words of limitation' which are required to create these estates and interests; and partly from the number of methods by which the ownership of land may be conveyed. The last evil has increased enormously during the last thirty or forty years. Formerly a conveyancer was sufficiently equipped for

ordinary work if he understood conveyances operating under the Statute of Uses, the statutory release, and the modern deed of grant. All these methods, even the simplest, are extremely technical, as every lawyer realizes when he attempts to explain to a layman the operation of the Statute of Uses, or why a conveyance to '*A* and his assigns for ever' only gives *A* a life estate. Even practising lawyers sometimes make mistakes in framing conveyances intended to operate under the Statute of Uses, or use wrong words of limitation[1]. But in recent years a new and fertile source of error has been introduced. Under the old system the conveyancer had a sheet-anchor in the shape of the legal estate; with ordinary care he could generally make sure of getting that, and then he was safe against ordinary risks. But during the last twenty-five years a different kind of conveyance has come into common use, not as a substitute for the old kinds, but in addition to them; for under the Trustee Acts and the Settled Land Acts a person who has only a limited interest in land, or no interest at all, may have power to cause the legal estate in it to pass from *A*, the person in whom it is vested, to *B*, provided the statutory requirements are complied with. This necromantic system of conveyancing causes great difficulties, as our reports testify, and it would be interesting to know how many bad titles it is responsible for. The conundrum 'When is a trustee not a S. L. A. trustee?' is often a difficult one to answer, and if it is answered wrongly the result may be disastrous. Vesting declarations under the Trustee Act present similar difficulties.

Our law of real property is in fact a hopeless jumble of inconsistent doctrines, causing the student a great waste of time in his attempts to master it, and providing innumerable pitfalls for the unskilful practitioner. The system bears most hardly on purchasers of small properties, for although the title to a small property is quite as likely to be difficult and complicated as in the case of a large property, the purchaser of a small property is disinclined to incur the expense of investigating the title to it, and so he generally takes the title on trust.

In this state of things it is difficult to see how any successor of Lord Cairns, to use the language of the Law Society, could do much in the way of 'carrying on the reform of the law of real property on the lines he so successfully laid down in the year 1881,' for even if the system of conveyancing by code-words and statutory powers of appointment could be extended, it would not obviate the expense and risks which are now incurred by purchasers of land. The

[1] See *Re Ethel & Mitchell* [1901] 1 Ch. 945.

defects of the existing system lie too deep to be cured by superficial measures of reform.

In answer to these objections the supporters of the present system will no doubt say that on the whole it answers well in practice, and it is quite true that, as in our wars, so in our conveyancing, we muddle through somehow. But the process is neither satisfactory nor economical. The most unfair part of the system is that it makes an innocent purchaser liable to pay for a mistake made by some one else. For example, suppose that a misguided practitioner, in framing a conveyance of land, were to make the grantor convey to the grantee 'in simple fee,' and that on a subsequent sale by the latter the purchaser were to object that 'in simple fee' has not the operation given to 'in fee simple' by the Conveyancing Act; no one can say with confidence that the purchaser would be safe in accepting the title, and yet if the court held that 'in simple fee' has the same operation as 'in fee simple' it would indubitably make the innocent purchaser, and not the misguided practitioner, or even his client, pay the costs of the proceedings. Other illustrations of the working of the system may be found in the pages of the Law Reports. Take the case of the attempted sale of the Savernake estate. This sale gave rise to five or six distinct lawsuits, one of which went to the House of Lords, and after several years of litigation, the purchaser (an extremely willing purchaser) threw up his contract because he despaired of getting a good title. It would be interesting to know how many thousands of pounds were wasted over this abortive sale. The case of *Scott* v. *Alvarez*[1] is even more instructive, because it shows the risks to which a purchaser of land may be exposed under the present system. In that case the sale gave rise to two distinct lawsuits, both of which went to the Court of Appeal. The contract of sale had been carefully framed by the vendor in order to prevent the purchaser from discovering a fatal defect in the title, and in the first proceedings the trick succeeded, for the Court of Appeal refused to relieve the purchaser. Owing to the skill and pertinacity of his solicitor, the defect was discovered, and in the second action the Court of Appeal refused to order specific performance. But the Court allowed the vendor to retain the deposit, apparently as a reward for her ingenuity in attempting to foist a rotten title on the purchaser. The loss incurred by the purchaser in deposit, costs, &c. must have far exceeded the value of the property. I submit that it is not creditable to us, as a business people, that such a case as this should be possible.

Cases in which purchasers and mortgagees have actually lost

[1] [1895] 1 Ch. 596; 2 Ch. 603.

money owing to defective titles, or absence of title, are by no means uncommon [1].

So far our retrospect has not been encouraging: the system of land transfer which prevails in every part of England, except the county of London, is admittedly unsatisfactory, and the rival system offered us by the Land Transfer Acts is in some respects worse. Let us retrace our steps, and see whether we can do better in another line of country.

When Lord Cairns (then Sir Hugh Cairns, A.-G.) made his first attempt to reform the law of real property, namely in 1859, he was so impressed by the complicated state of existing titles to land—which was, as he recognized, due partly to the antiquated doctrines of the law of real property, and partly to the practice of settling land by entail—that he thought drastic remedies necessary to put matters on a business-like footing: he proposed to have a tribunal for simplifying existing titles, and a system of registration of title, analogous to the system of registering title to stock. In other words, he saw that it was impracticable to have a system of transferring land by entries in a register of title, as we do in the case of stock, until titles to land had been simplified so as to be capable of being entered in a register. Sir Hugh Cairns's attempt to establish a Landed Estates Court failed, and it is not likely that such an attempt would be successful now. But is there no other way of simplifying titles so as to make land capable of being transferred free from the complications caused by feudal doctrines on the one hand and settlements on the other? I venture to think that there is, and that it is to be found by adapting a system of conveyancing suggested by Mr. Wolstenholme some years ago.

Mr. Wolstenholme's suggestion took the form of a bill which (with the assistance of Mr. B. L. Cherry) he drafted in 1898, on the instructions of the Law Society. Its object, as the prefatory memorandum tells us, was 'to make the title to land approximate as nearly as circumstances permit to the title to stock, and to obtain the same advantages as would be secured under as good a system of registration of title as may be devised, without the disadvantages incidental to a register of owners.' The fundamental idea of the bill was that, as between vendor and purchaser, only absolute ownership should be recognized; it allowed the fee simple, or a term of years, to be conveyed by *A* to *B*, but an estate for life, or in tail, or remainder, or the like, was only to be created by a declaration of trust: every such estate was to be an equitable and not a legal

[1] Most of these cases do not come into court, and are known only to the parties themselves.

interest, like a life interest in stock. Settlements of freehold land, unless made by way of trust for sale, were to be made by conveying the fee to the first tenant for life: the interests of the remaindermen would be equitable, and would be protected by cautions and inhibitions, of which a public register was to be kept.

Without venturing to criticize in detail this ingenious scheme for simplifying titles to land, it may perhaps be doubted whether it would have effected so complete a reform of the law of real property as is desirable. It would apparently have left the venerable doctrines of seisin and tenure as the foundation, in theory at least, of that branch of our law: it would not have done away with the learning of uses; and words of limitation would have been as necessary as they are now. On the other hand it would have added to our law of real property some essential differences between legal and equitable estates which could hardly have failed to cause difficulties in the case of instruments framed by unskilful practitioners.

It seems to be admitted by all who have considered the subject, from Sir Hugh Cairns in 1859 to Lord Selborne in 1873 and Mr. Wolstenholme in 1898, that the object to be aimed at is, in Mr. Wolstenholme's words, 'to make the title to land approximate as nearly as circumstances permit to the title to stock.' The difficulty is that land in England is held under titles which in many cases go back twenty, forty, or fifty years, and that a title of this kind is far removed from the simplicity which distinguishes the title to stock. The problem is how to convert a complicated title into a simple title, and prevent defective and complicated titles from being created in the future. Sir Hugh Cairns's scheme of a Landed Estates Court is unfortunately impracticable, and the system of registering possessory titles under the Land Transfer Acts has broken down, so we must seek some other remedy. It is submitted that the remedy is to be found in a modification of Mr. Wolstenholme's ingenious plan.

The first thing is to simplify the law of real property by abolishing the antiquated and inconvenient doctrines of tenure, seisin and uses. The next thing is to make the law of real property as similar as possible to that of personal property by abolishing all legal estates except two—absolute ownership and terms of years—and making all other estates and interests take effect in equity only. The third requisite is to provide a simple method of conveyance, applicable to all cases without exception, and thus make it impossible for an owner of land to complicate the title to it.

These objects would, it is submitted, be attained by an Act of Parliament containing provisions to this effect:—

I. No future disposition of land to take effect at law unless it
(*a*) conveys the absolute ownership [1], or
(*b*) creates or transfers a term of years, or
(*c*) creates or transfers an easement, rentcharge, or other incorporeal hereditament.

II. All other dispositions to take effect in equity only, and subject to equitable rules [2].

III. Every conveyance of the absolute ownership to be by deed in statutory form [3] and to be registered [4]. Every conveyance so made to be effectual to transfer all the rights and interests of the transferor, without words of limitation [5].

IV. No disposition of the absolute ownership to be effectual at law unless registered, and no disposition of the absolute ownership to be capable of registration if it purports or attempts to transfer or create any right or interest, except the absolute ownership [6].

V. Every person claiming to be entitled to a term of years, easement, rentcharge, or other incorporeal hereditament, or to the benefit of a restrictive covenant, right of re-entry, &c., to have the right of registering his claim, provision being made for the removal of unfounded claims and for compensation to persons aggrieved [7].

VI. No claim to or notice of any equitable estate, right, or interest, except as above-mentioned, to be entered on the register.

Provision would have to be made for preserving various rights and incidents arising out of tenure, such as escheat, quit-rents, heriots, &c., and for giving effect, as equitable interests, to rights in

[1] For the sake of simplicity, the necessity of providing for the conveyance of undivided shares, or of minerals apart from the surface, is not here considered.

[2] This would involve the abolition of contingent remainders—in itself a great advantage.

[3] This would be as simple as an ordinary transfer of stock; except that the land conveyed would require a more elaborate description than is necessary in the case of stock. In this respect it is important that the good old practice of conveyancers in requiring an adequate verbal description of the land conveyed, and not relying on a plan, should be followed. As Mr. Joshua Williams remarked (Report of Commissioners on Registration of Title, 1857, p. 308): 'A map is a good servant, but a bad master; very useful as an auxiliary, but very mischievous if made indispensable.' The practice of the Land Registry in making a plan the principal, if not the sole, test of identity of every piece of land is contrary to all the teachings of experience.

[4] Registration would require the filing of a copy or memorial of the conveyance. The original would be retained by the owner. The register would not be open to public inspection.

[5] The necessity for using words of limitation in equitable dispositions of the fee simple, so far as it exists, should also be abolished.

[6] It would probably be desirable to provide a statutory form of mortgage, for use in simple transactions, similar to that given by the Conveyancing Act. In important transactions the most convenient plan would probably be to have a statutory conveyance, accompanied by a deed of defeasance, as is done in the case of stock.

[7] The plan of registering a claim to a lease would, it is submitted, be simpler than registering the lease itself. The plan would obviate the objection taken by the Law Society ('Observations,' p. 7), as a 'claim' to a lease could be withdrawn at any time. The same remark applies to incorporeal hereditaments.

respect of dower and curtesy. Provision also would have to be made for cautions, inhibitions, searches, &c., but the provisions of Mr. Wolstenholme's bill in this respect are so admirable that it is unnecessary to enter into details here.

An Act of Parliament containing provisions of the nature roughly indicated above would, it is submitted, in course of time have the effect of simplifying the title to land to such an extent as to make it 'approximate as nearly as circumstances permit to the title to stock.' For example, if a person absolutely entitled to land wished to settle it in strict settlement, he could not (under the scheme here suggested) do so by limiting legal estates for life with remainders in tail and giving powers of appointment and of limiting jointures and portions, &c.; he would have to convey the land to trustees as absolute owners, and declare the limitations and powers (which would take effect in equity only) by a separate deed; if it became necessary to limit a term to secure a jointure or for raising portions, the trustees would be bound to do what was necessary; or if the tenant for life wished to exercise his powers of leasing or selling under the Settled Land Acts, the trustees would be bound to execute the necessary deeds[1]. So if the tenant for life and tenant in tail executed a disentailing deed, or exercised a joint power of appointment, the trustees would be bound to dispose of the legal estate in accordance with their directions. But neither the settlement itself, nor the disentailing deed, nor the deed exercising the joint power, would be registered or appear on the title in any way: as between the trustees and any lessee or purchaser, they would appear to be absolute owners, just as trustees of settled stock do. No purchaser would be concerned to inquire whether the trustees had been properly appointed or whether they were trustees for the purposes of the Settled Land Acts: no question of 'compound settlement' would be possible.

It may be asked, What advantages does this scheme offer beyond those offered by Mr. Wolstenholme's scheme?

In the first place, it is submitted that the new scheme would prevent the title to land, as between vendor and purchaser, from being affected by the antiquated doctrines of seisin, tenure[2] and uses, or by the accidental omission of words of limitation. Mr. Wolstenholme's scheme does not touch these points.

In the second place, it is submitted that the new scheme, so far as

[1] In the case of occupation leases for terms not exceeding twenty-one years it would probably be convenient to provide that a lease executed by the tenant for life in accordance with the requirements of the Settled Land Acts should be as effective as if executed by the trustees.

[2] Except, of course, as between landlord and tenant.

it affects settlements of land, follows exactly the analogy of settlements of stock, and that it would be simpler in its working than Mr. Wolstenholme's scheme. Under the latter, a settlement of land would be made by conveying the fee to the tenant for life as absolute owner, and yet on a sale by him the purchase money would have to be paid to trustees or into court, and on his death his representatives would have to convey to the new tenant for life, or the tenant in tail. It is submitted that the more convenient plan is to keep the land vested in trustees, as is done in settlements of stock[1].

But the principal advantage which is claimed for the new scheme is that it would make it impossible for the most ignorant practitioner to cloud the title to land. No one ever heard of the title to stock being made doubtful by a badly drawn transfer, and it ought to be equally impossible in the case of land. Under the new scheme, a conveyance of land would be as simple in its operation as a transfer of stock, and if an ignorant practitioner attempted to make it anything beyond a conveyance of the absolute ownership, it would be refused registration. No such complete safeguard is afforded by Mr. Wolstenholme's scheme.

The main point of difference between the two schemes—the registration of conveyances—is not really serious; for Mr. Wolstenholme's scheme involves a Land Registry for registering cautions and inhibitions and giving certificates of searches, &c.

If it is asked why registration of conveyances should be insisted on, the answer is that the simplicity of title to stock is due entirely to the system of registration. In the case of a well-regulated company no transfer of stock can be registered unless it is in the proper form[2]. Let the reader try to picture to himself the confusion which would result if every purchaser of stock were allowed to frame his transfer according to his own fancy.

Incidentally the registration of conveyances, with its accompanying safeguards of cautions and inhibitions, would make it practically impossible for any one to commit frauds by the suppression of deeds[3].

Owners of large estates may possibly object (as Lord St. Leonards in his own day objected) to the notion of having their land vested in trustees; but the obvious answer is that no one is under any

[1] This was considered by Lord Selborne to be one of the important advantages which would follow from his Land Transfer Bill of 1873.

[2] Care would have to be taken to guard against the danger of such an inconvenient doctrine as that laid down by Buckley J. in *Re Latheby and Christopher, Ltd.* [1904] 1 Ch. 815, being applied to statutory conveyances of land.

[3] Cases of this kind sometimes occur, although they rarely attract public notice: see *Onward Building Society* v. *Smithson* [1893] 1 Ch. 1.

obligation to put his land in settlement, and if he wishes to do so any inconvenience and expense which may result should fall on him and not on innocent purchasers. In the memorandum prefixed to the Law Society's Conveyancing Bill of 1898, Mr. Wolstenholme remarked, by way of Parthian shot: 'Any objection to the principle of the Bill may be met by the answer that the principle is already in force as regards stock.' The same answer may, it is submitted, be made to any objection on the part of landowners to the scheme here suggested, for it follows the method of dealing with stock even more closely than does the scheme embodied in the Law Society's Conveyancing Bill of 1898.

To put the matter in the convenient form of dogmatic propositions:—

(1) Our existing system of conveyancing is unsatisfactory, and exposes purchasers and mortgagees to unnecessary risks: this fact was the basis of Lord Selborne's and Lord Cairns's attempts to reform the law, and it was tacitly admitted by the Law Society when they brought forward Mr. Wolstenholme's Conveyancing Bill in 1898.

(2) The system introduced by the Land Transfer Act, 1897, is not adapted to the complicated titles under which land is now held, and is itself too complicated.

(3) Lord Cairns's scheme of a Landed Estates Court to clear existing titles would be costly and unpopular, but the principle is sound, and it can be carried out in a different way by making it impossible to create complicated titles in future. If this is done, existing complications will gradually and automatically disappear.

(4) The law governing the ownership and transfer of personal property of a permanent nature, such as stock, is of modern origin, and well adapted to modern requirements; the law of real property, which has come down to us from the times of the Crusaders, is full of useless technicalities and complications, and should be made to approximate as nearly as possible to the law of personal property.

(5) This was the opinion of Mr. Joshua Williams, Lord Selborne, Lord Cairns, and Mr. Wolstenholme, and is the basis of the Law Society's Conveyancing Bill of 1898.

(6) No system will be satisfactory which makes dealings with land dependent on the working of a public office. We do not want a government office for the transaction of conveyancing business, or a Land Registrar with vast discretionary powers. The duties of a registrar should be confined to the simplest matters: all other transactions should be carried out by the parties themselves.

So far there is probably little difference of opinion among those who have examined the subject by the light of practical experience. What form the remedy should take is undoubtedly a question on which opinions differ. The suggestions contained in this article are an attempt to combine the ideas of three of the most eminent lawyers whom this generation has known, and to profit by the experience of the last twenty-five years [1].

CHARLES SWEET.

[1] Since this article was written the Married Women's Property Act, 1907, has been passed, and the question with reference to the validity of leases granted by a husband to his wife as trustee, alluded to *ante* p. 30 note, has been discussed in the Solicitors' Journal for September 14, 1907. The suggestion has been made that such leases are valid under section 50 of the Conveyancing Act, 1881, which provides that freehold land may be conveyed by a person to himself jointly with another person *by the like means by which it might be conveyed by him to another person*, and may *in like manner* be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person: the argument being that 'convey' here includes 'demise,' because by section 2 'conveyance' includes lease, and 'convey' has a corresponding meaning. The suggestion is novel and ingenious, but it presents certain difficulties. The object of the latter part of section 50 was obviously to make it possible for a husband to convey freehold land to his wife without the intervention of a grantee to uses, as is shown by the former part of the section; the object of this was to put freehold land on the same footing as leaseholds, which by the Law of Property Act, 1859, can be conveyed by one person to himself and another jointly *by the like means as he might assign the same to another*. The object of section 50 clearly was to alter the law as to the conveyance of freehold land. It is extremely improbable that the framers of the Conveyancing Act intended, by a section professing to be concerned with the 'Construction and Effect of Deeds and other Instruments,' to alter the law relating to the capacity of married women to acquire and hold property, for at that time married women were still under disability (except in the few cases provided for by the Married Women's Property Act, 1870), so that if section 50 had the effect of enabling a husband to grant a lease to his wife, the result of his doing so would have been that he could dispose of it the next day, and would become entitled to it absolutely by survivorship. It is even more improbable that the framers of the Conveyancing Act intended by section 50 to enable a married woman to take a lease from her husband as trustee, for she would have been unable to assign it. Moreover, if the object of the section was to enable a husband to grant leases to his wife, it is difficult to see why it is confined to freehold land; it clearly does not enable a husband to grant an underlease to his wife. It is submitted therefore that a contrary intention appears, sufficient to exclude the suggested interpretation of section 50, which, it may be pointed out, does not appear to commend itself to those responsible for the drafting of the Married Women's Property Act, 1907 (Sol. Journal, Oct. 5, 1907). They seem to think that the capacity of entering into contracts given to married women by the Married Women's Property Act, 1882, enables her to acquire a lease by way of trust, as section 24 declares that 'contract' includes the acceptance of any trust; *sed quaere*: the result before the new Act would have been that a married woman could accept a lease as trustee, and could not dispose of it.

I take this opportunity of adding one or two details to the scheme for amending our conveyancing system which is roughly sketched out in this article. In order to prevent evasions of the scheme by the creation of long terms of years it would probably be necessary to provide that no term of years determinable on life should take effect at law, and that no term of years exceeding (say) ninety-nine years, should be capable of being created or assigned so as to take effect at law except by registered deed in statutory form. With regard to wills, the restrictions above suggested (p. 38) as to the creation of legal estates and interests in land would apply to devises, and it would probably be convenient to require that every gift by will of the absolute ownership or of a long term of years in land should be perfected by a registered conveyance in statutory form from the personal representative to the devisee. The practice of allowing an assent to a devise to be given by informal instrument or word of mouth is most inconvenient.

October, 1907.

THE TRIAL OF PEERS.

MR. PIKE, in the last number of this REVIEW, has penned a most valorous defence of the Year-Book report which describes a trial in the year 1400 before the Steward of England. A reply appears to be called for. Let me first of all, however, proffer my thanks to Mr. Pike for correcting my inaccuracies, and for his lecture on the necessary equipment 'for the patient examination of so delicate a question as that of the forgery of a great precedent.' His precept is excellent, but one could wish that his example was more exemplary.

The first conclusion of Mr. Pike is that 'the attempt to prove the report a forgery by internal evidence distinctly fails.' He seems to admit that it would be sufficient proof of forgery if it could be established, contrary to the statement in the report, that the office of Steward was not then vacant; but upon this point, he contends, there is 'very poor evidence, or rather no evidence at all.' Let us see whether this is the case.

The appointment in Parliament of Thomas of Lancaster as Steward of England is mentioned by Walsingham and the Annals of Henry IV; he is stated to have been appointed by the delivery to him of a rod of office. 'The Steward, Constable, and Marshal of England' are mentioned in the Parliament Roll in connexion with coronation claims. The Coronation Roll of Henry IV informs us that the king committed the office to his son Thomas, 'to be exercised at the said coronation'; but the words 'hac vice tantum,' inserted in limited appointments of this period[1], are significantly absent: this roll is merely an official memorandum relating to coronation claims; it is, of course, no evidence that Thomas was given an estate of freehold in the office of steward; nor is it evidence that his appointment was limited to the coronation. On account of the prince's youth, Percy, Earl of Worcester, was appointed vice-seneschal. At the first trial of peers, which took place in Parliament during the following November, Thyrning C. J. pronounced judgment, according to one chronicler, 'for the Steward

[1] See the appointment of the Earl of Warwick in 1413, of the Duke of Gloucester for the coronation of Henry VI, and the three appointments of the Earl of Warwick in the reign of Edward IV. In the appointment of the Duke of Buckingham in 1477, the word 'tantum' is for the first time omitted.

of England'; according to another, because Percy, the vice-seneschal, who *ex officio* should have pronounced judgment, was ill. Lastly, from October, 1399, onwards, Thomas of Lancaster is repeatedly styled Steward of England in patent and other rolls; he so describes himself in his own correspondence and in his last will, &c., &c.; never in the whole history of the Stewardship had any previous holder so frequently [1] been given his official style. This is what Mr. Pike is pleased to call 'no evidence at all': a conclusion which he arrives at by placing a hazardous construction on a mere memorandum; by rejecting the testimony of documents which received the great seal of England; and, finally, by invoking the hypothesis of Thomas's reappointment, for which there is no evidence whatever.

The internal evidence against the report by no means ends here: it contains, for example, an undoubted anachronism. The rebel earl, according to the report, was indicted by a commission before the Mayor and Justices in London. Commissions of this kind are always enrolled on the Patent Rolls; and it is perfectly well known that a commission did issue to the Mayor and Justices in January, 1400, directing inquiries as to all treasons in London and the suburbs since the commencement of the reign. It was a famous commission; amongst others it tried the Bishop of Carlisle, and it can hardly be doubted that the genuine indictment of the chief conspirators [2] emanated from this source. Unfortunately this commission—and it was the only one—did not issue until the twenty-fifth of January, when all the rebel earls, Huntingdon included, were unquestionably dead.

So much for the internal evidence. It has been unnecessary thus far to consider who was the accused earl. Upon this point it is not entirely clear from Mr. Pike's argument whether he is willing to stand or fall with the Earl of Huntingdon. One might perhaps suggest that the number of earls at that time was not large, and that Huntingdon is the most promising volunteer for the forlorn hope. At all events, the major part of Mr. Pike's argument is devoted to the fate of that earl; so let us also limit ourselves to this case; and examine the conflicting views as to how John Holand, Earl of Huntingdon, spent the last few days of his life.

[1] During the first nine years of Henry the Fourth's reign, Thomas is described as Steward of England more than 100 times in the Patent Rolls alone. During the same period of Richard the Second's reign, John of Gaunt is once so styled on the Patent Rolls.

[2] Together with the Earl of Huntingdon were indicted the Earls of Kent and Salisbury, Lord Despencer, and several other persons of inferior rank. Of the three peers, the two former, it will be remembered, were 'lynched' at Cirencester; the third was 'lynched' at Bristol.

Mr. Pike's present theory is thus stated by him: 'On the whole it seems quite possible that Huntingdon attempted to escape, and did for a time actually escape, after sentence had been pronounced by the High Steward at Westminster. . . . So far as the evidence goes, Huntingdon may have been sentenced at Westminster, and "lynched" at Pleshey, and this possibility fits in with all the known facts.'

Now what are the known facts? On the evening of January the fourth, the king, who had become aware of a plot against his life, left Windsor for London; and on the next day orders were issued to all the sheriffs for the apprehension of the conspirators, including Huntingdon, who is mentioned by name. So nearly, however, had the king been taken by surprise that Windsor fell into the hands of the conspirators. Here we have a starting-point for our inquiries; it cannot possibly be suggested that Huntingdon was tried and sentenced for this conspiracy before the fifth of January. On the sixth of January orders were dispatched to the captain of Calais, directing him to arrest the Earl of Huntingdon if found at Calais or in the parts of Picardie. From the sworn evidence of William Peion, we know that Huntingdon had begun his flight down the Thames before the seventh of January; this date is confirmed by other entries in the Exchequer Rolls and cannot be impugned, whatever may be urged against the date given for Huntingdon's departure from London. Well, we can trace the earl's flight, first to Hadleigh Castle, then to Leigh in the Hundred of Rochford, then to the house of John Pritewell, where he was captured; and in proof we can produce not merely chronicle evidence but sworn testimony, of William Peion, of the king's escheator for Essex, of John Pritewell himself. Then, on the tenth of January, the Archbishop of Canterbury writes from London to announce that Huntingdon and his followers are detained prisoners in Essex and Kent by the King's supporters; while, on the same day, the common-form order goes to the Tower to be prepared to receive the earl's person.

Here is a wonderfully close chain of unimpeachable evidence, fatal to the view that Huntingdon could have been tried in the court of the Steward prior to his famous excursion into Essex. Here, too, I think we may take leave of Mr. Pike's still-born theory: I have demonstrated that Huntingdon could not have been tried before his flight, or before the tenth of January.

It remains to be seen whether there is any other tenable theory, and for this purpose let us follow Huntingdon's career to its bitter end. The contemporary English chronicles relate, some with much particularity, how the earl was led after his capture, first to Chelmsford, then to Pleshey, where he was unceremoniously exe-

cuted. That Huntingdon died and was buried at Pleshey cannot be disputed, but the date of his death is less certain; it can, in my opinion, be proved, as shown later, that he died before the twelfth of January; but, for the moment, we will not insist on so early a date. The only possible theory which is left to the Year-Book apologist is that Huntingdon was captured in Essex, brought back to London, tried and sentenced, that he again escaped or by some means got to Pleshey, and was then 'lynched.' In such case, contemporary writers described in continuous narrative, full of details [1], the story of Huntingdon's flight and death in Essex; but omitted all reference to so startling and necessarily notorious an interlude as his removal to London and trial there with all the pomp and circumstance mentioned in the Year-Book. So wild and fantastic a theory may be instantly dismissed.

There are still two points which it is desirable to mention in order that the argument may be absolutely conclusive. The first point is the date of Huntingdon's death. I will now state emphatically that Huntingdon's death was judicially known at Oxford on Monday the twelfth of January. Several persons were on this date sentenced to death at Oxford for confederating with 'the late Earl of Huntingdon,' and other persons known to be dead. I find that the rule prohibiting the trial of persons for such an offence, unless and until the principals named were either dead, outlawed, or sentenced, was a well-recognized rule at this time and rigidly enforced [2].

Lastly, as regards the reference to a judgment on the Exchequer Rolls. This, Mr. Pike says, 'proves conclusively that it was known in the Court of Exchequer on the sixteenth of May, 1400, that some judgment had been given against the Earl of Huntingdon.' I have no hesitation in replying that it proves nothing of the kind. The facts are these: Huntingdon was a rich man, and possessed large quantities of jewels and other valuables, not in one, but in many widely scattered places. After the rebellion had subsided, the Exchequer proceeded to collect these, and the steps taken by the Court for this purpose are recounted at length in page after page of the Exchequer records. Now, the officials of the Exchequer were respectable persons, who conducted their business in as regular

[1] The French chronicles introduce a legendary escape from Cirencester, and confuse 'Essex' and 'Escoce'; otherwise the various accounts contain only the usual trifling discrepancies. Some chronicles devote several pages to their account of Huntingdon's flight and death.

[2] See the Controlment Roll, 1 Henry IV, m. 20; ibid. 3 Henry IV, mm. 15, 29; ibid. 4 Henry IV, m. 9, and Coram Rege Roll, Mich. 4 Henry IV, rex m. 4, case of Adam of Usk; Controlment Roll, 4 Henry IV, m. 25, and Coram Rege Roll, Trin. 4 Henry IV, rex m. 8, case of Sir John Bohun; Controlment Roll, 5 Henry IV, m. 8; &c.

and orderly a manner as was possible; if they could justify their seizure of property by virtue of a judgment pronounced against the owner, it was customary and eminently proper for them to do so. Nevertheless, out of the scores of cases which I have examined, in only one is a judgment mentioned; in all the others we find the lame formula that the goods belong to the king 'by reason of the earl's forfeiture'—strong circumstantial evidence that no judgment had been pronounced. The same argument applies with even greater force to the returns of the king's escheators, for they had to deal with lands as well as chattels. These officers are always scrupulously careful to refer to a judgment if they are aware of one. Those escheators who made returns after the posthumous judgment in Parliament against Huntingdon (second of March, 1401) refer to that judgment. When, therefore, we find the escheators referring punctiliously to the *indictment*[1] of Huntingdon in support of their title, better evidence against the existence of any *judgment* could hardly be suggested.

This, briefly, is how the Exchequer evidence stands. What is the value, then, of the solitary reference to a judgment? Simply nothing; it is a blunder[2]; it is completely swamped by the weight of counter evidence from the same source. And there is no evading that evidence: it cannot be suggested that the Exchequer were not informed of the judgment, for the barons of Exchequer are stated in the Year-Book to have been present at the trial. Apart from this, the proposition that knowledge of the judgment came to the Exchequer once only during an otherwise unbroken period of ignorance is quite incredible.

Therefore I say that the charge of forgery must be held strictly proved. The date of the forgery is, to be sure, quite a distinct problem, and space forbids any further attempt being made here to substantiate the charge against Henry VII. Whether, however, the report is or is not a Tudor forgery, it is indeed 'a great precedent.' The trial of 1415 may be a good enough precedent, Stubbs's strictures notwithstanding, for the *constitution* of the Court of the High Steward; but for *procedure* the forged precedent is the only one[3]. Under these circumstances one seems fully

[1] The practice was to furnish the Exchequer with transcripts of outlawries, judgments, and other proceedings whereby lands or goods were forfeited to the Crown. I have recently discovered that, in accordance with this practice, a transcript of the indictment of the principal conspirators was prepared and lodged with the King's Remembrancer. The inference that there was no judgment seems irresistible.

[2] I can produce at least one similar blunder. There is a reference in the L. T. R. Memoranda Roll for Michaelmas 1400 (m. 45 d), to the 'conviction' of the Earl of Kent. At all events, Mr. Pike's ingenious explanation will not apply to this case.

[3] In 1415, the accused peers were arraigned before commissioners; they were afterwards judged, but not arraigned or tried, by their peers.

justified[1] in asserting that the institution of the Court of the High Steward is a very discreditable episode in the constitutional history of England.

L. W. VERNON HARCOURT.

[1] Mr. Round, when he questioned the fairness of this assertion, apparently understood it to apply also to trials before the Steward in Parliament. This was not intended, and would not be fair.

[We have thought it right to give Mr. Pike the opportunity of making a short rejoinder, and he has sent us the following remarks.—ED.]

Mr. Vernon Harcourt, after having vehemently accused an English Sovereign of deliberately forging a precedent for the purpose of 'doing' a subject 'to death,' now calmly enters a *Nolle prosequi*. All that remains is a vague allegation of forgery committed by some unknown person, at some unknown time, without any assignable motive. Had that alone appeared in the book, as published, instead of the definite charge against Henry VII, it would hardly have called for very serious consideration. Little more would have been needed than to show the inability of the author to translate the report which he impugned. Not one of the significant errors in translation which were exposed in the last number of the LAW QUARTERLY REVIEW has been denied, defended, or palliated. On that head, therefore, there must be judgment by *Nihil dicit*. For the rest, it would have sufficed to ask for a close comparison of the 'reply' with the review itself, had there not been introduced into the reply some statements and arguments relating to dates which are not in the book. A reviewer's duty ends with the review of the book itself. His task would be endless if he had to test the value of all an author's after-thoughts. In this case, moreover, all the human interest, and not a little of the importance of the subject disappear with the disappearance of the Forger-King.

L. O. P.

PROPERTY IN LICENCES.

THE licensing laws of this country are never allowed to remain for long without proposals for their amendment. Usually the proposals are for greater stringency in the regulations affecting the sale of beverages in licensed houses, or in some way are aimed at the further regulation of the licensed victualler's business. But of late a new kind of proposal has been brought forward. Its immediate genesis seems to be the Licensing Act of 1904—a statute which in its turn had its origin in the famous decision of the House of Lords in *Sharp* v. *Wakefield* ([1891] A.C., 173). This proposal is concerned with the durability of the licence itself. *Sharp* v. *Wakefield* had decided that, apart from reasons connected with the unfitness of an existing licence-holder or of his premises, the justices might, in the exercise of their discretion, refuse renewal. The Act of 1904 provided that if renewal of a licence was refused on the score of redundancy, and not because of the unfitness of licensee or licensed premises, compensation should be paid out of a fund formed from the enforced contributions of the owners of licensed premises within the district. The authors of the new proposal wish to put a 'time limit' upon the operation of this compensation scheme; that is to say, they demand that after the expiration of a given number of years, no compensation shall be paid to dispossessed licence-holders, but that, on the contrary, all licence-holders shall become automatically and simultaneously dispossessed. And they base the justice of this proposal upon the argument that there is no continuing property in licences beyond the year for which, in terms, each licence is granted. Yet the phrase 'licensed property' is one of the commonest with which lawyers and business men are familiar, and every one knows that in the licensed property, as in other property markets, licensed premises change hands at figures based upon calculations of a number of years' value—a value which would be cut down to a small fragment if the premises ceased to be licensed. The Inland Revenue computes the Estate duties payable by the estates of deceased owners of licensed premises upon the same basis of assumed permanence. Magistrates have statutory powers to make licence-owners spend large sums upon structural improvements of licensed premises—sums which could not be recu-

perated out of a year's trading, and these powers are exercised freely. Debenture holders have lent money, to the extent it is estimated of 100 millions sterling, upon the security of licensed property, the value of this property being again dependent upon the permanence of the licences attaching to the premises. The proposition, therefore, that there is no property in licences beyond a year is sufficiently startling and sufficiently serious to demand inquiry.

One naturally begins the inquiry by asking, 'What is property?' Property, to borrow the language of the dictionary, is, in the connexion we are now considering, 'the exclusive right of possessing, enjoying, and disposing of a thing; ownership.' 'Property' is the right of ownership in a thing, but not necessarily ownership of the strict kind alone contemplated by Austin. And without burdening this paper with a disquisition upon tenements and hereditaments, corporeal and incorporeal property, we may usefully adopt the third of the definitions of property given by the editor of Williams's Principles of Real Property (15th ed., p. 14):—

'As denoting all rights, or an aggregate of rights, which either are rights of ownership or annexed to the ownership of land or goods, or are valuable as being likely to result in the ownership of land or goods, or in the improvement or more beneficial enjoyment of some land or goods owned; all rights, in fact, which can be assessed at a money value, that is, which are capable of being exchanged for the ownership of money.'

No modern lawyer, I think, would quarrel with this definition of property; and it obviously includes the rights acquired by a purchaser of licensed premises. Such a purchaser acquires, first, the ownership (in the old, strict sense) of the freehold (if it be a freehold he is buying) of the licensed premises, the subject of the purchase; he acquires also the rights (to sell intoxicating liquors granted by the State) 'annexed to the ownership of' the premises, which rights 'are valuable as being likely to result in the . . . more beneficial enjoyment of' the premises. His property is 'the aggregate of rights' of ownership and of rights annexed to ownership. They are rights 'which can be assessed at a money value.' There is no doubt that the word 'property' is not used wrongly in the commercial term 'licensed property.'

Let us analyse again the components of 'licensed property.' First, there is the freehold (or whatever the estate happens to be) of the land and buildings; and, secondly, the proprietary rights in the justices' licence granted to the licence-holder, and attached to the premises. And that licence, adds the new school of licensing economists, is a right lasting for one year only. Incontestably, stated barely and literally, that is so. But if we stop here, as these

new economists would have us, we arrive at this position:—£1,000 is paid for some licensed premises, which without the licence would not be worth £200; the balance must be the value of the licence for the remaining months of the current year of the licence. Every one of course knows that in fact that is not so. The licence part of the purchase money is calculated upon a number of years' purchase, just as the other part is. If the sale comprised only the premises, plus the current annual licence to sell intoxicating liquors, the price of our hypothetical premises would not be £1,000, would not be much more than the £200, the value of the premises unlicensed. In point of fact there would be no purchase price at all, because the property would be valueless and unsaleable to a purchaser of licensed property if the licence were to continue no longer than these few months.

Clearly there is a third component in the 'aggregate of rights' which make up a purchase of licensed property, and a component which, in point of money value, is much more important than the other two. This third component is the acquisition of the vendor's rights of expectation of indefinite renewal of the licence. This right is something of value 'annexed to the ownership of land,' resulting, in realization, in 'the more beneficial enjoyment of' the premises. It therefore comes within our definition of property, and must be so treated.

The foregoing cannot, I imagine, be seriously disputed. But we are not at the end of the inquiry here. The controversy has arisen over the nature and value of this right of expectation to renewal and the obligation of the State not to defeat it. The general assumption—at any rate prior to the decision in *Sharp* v. *Wakefield*—was that, apart from the proof of unfitness of the licensee or his premises, renewal of the licence year by year was a matter of course, and that as it had in fact been for generations a matter of course it had grown to be a matter of right, one upon which the most prudent investors had calculated without a shade of doubt crossing their minds; and amongst these prudent investors are to be included the cautious and able financiers who have invested insurance companies' and other like funds in brewery debentures, which are secured upon property whose substratum would disappear if licences were of only a year's value. The licence had come to be looked upon, not as a yearly, but as in reality a permanent thing, subject to loss only in the event of misbehaviour. The yearly form of the licence and the annual ceremony of renewal were regarded simply as State machinery for the convenient administration of the law regulating the good order of licensed houses—a point of view emphasized by the difference in procedure in the

case of an application for a new and that for a renewed licence. This confident assumption was disturbed by *Sharp* v. *Wakefield*, but in this sense: that a flaw had been detected in the complete legal security licence-holders had thought they enjoyed, and a flaw which justice and the needs of the case demanded should be mended. This amendment was made by the Licensing Act of 1904, but as the new school of temperance economists recognize this effect of the 1904 Act, and say that because of it that legislation should be repealed we are invited to go behind the 1904 Act for a determination of the position.

The estimate of the licence-holder's right to expect renewal made by the new opponents of permanence in licences is very different. They see in the business transaction of purchasing licensed property a mere gamble—a speculation that the State will in the future do something which the State has every right not to do, and indeed should not do. They deny that purchasers of licensed property have had any ground which the State need notice for assuming in their calculations of the purchase price that the licence will be renewed. This, even more than the other attitude, forces the lawyer to consider whether, as interpreted by decisions of the Courts, as well as by legislative enactments, the State has so recognized the assumption of purchasers of licensed property as to strengthen their expectation of renewal into an equitable right.

As far as legislative enactments are concerned little space need be occupied. Undoubtedly the Licensing Act of 1904 recognizes an equitable right to renewal, for it provides that, save on the misbehaviour or unfitness grounds, renewal of licences shall not be refused without the payment of compensation—though some contrary significance might possibly be detected in the arrangement whereby that compensation is payable, not by the State, but out of a compulsory levy upon the holders of licensed property themselves. With regard to this, however, political exigencies in drafting the Bill would have to be considered, and, as pointing in another direction, reference would have to be made to an abortive piece of legislation—the Local Taxation (Customs and Inland Revenue) Bill—which, as introduced, provided that part of the produce of some extra taxation on beer and spirits should be used for the State purchase of licences. Reference should also be made to the Wine and Beerhouse Act of 1869, sec. 19, which enacts that the beerhouses then in existence (and recently amounting to about a third of all the licensed houses in the country) should not be refused renewal of their licences save on the four statutory grounds, relating to the conduct or character of the licensee or the premises. Whatever the law, therefore, as to other houses, there was in regard to these houses, and

subject to liability to loss of licence on the statutory grounds, an absolute right to renewal in perpetuity. That position has, however, now been changed by the Licensing Act of 1904, which has brought these ante-1869 beerhouses into line with other houses. All are now subject to the non-renewal on payment of compensation arrangements of the 1904 Act.

A reference to the Licensing Acts of 1872 and 1874 will also not be inappropriate, because certain provisions in those Acts were calculated to establish in the minds of licence-holders the belief that, subject to good conduct, renewal of their licences was assured. Sec. 42 of the former Act declared that the applicant for the renewal of a licence need not attend in person, unless required by the justices to do so, and sec. 26 of the Act of 1874 ordained that the justices should not require this personal attendance 'save for some special cause personal to the licensed person.'

Now as to the case law which illuminates the subject. And first let us look at the famous decision in *Sharp* v. *Wakefield*. The facts of that case were shortly these:—The licensee of an inn in Westmorland applied to the licensing justices in the ordinary course for the renewal of his licence. It was refused—not because the licence-holder or premises were unfit, but because the justices thought the house was not required by the neighbourhood, and that it was remote from police supervision. The owner of the inn appealed, and contended that the court was not by law entitled to inquire into the character and wants of the neighbourhood, or to refuse a grant by way of renewal upon such grounds. The court of quarter sessions overruled this contention, and, after hearing evidence, refused to renew the licence on the ground of the remoteness of the house from police supervision, and of the character and necessities of the locality and neighbourhood. The Divisional Court and the Court of Appeal upheld this decision, as did also the House of Lords. 'The grant of a licence,' said Lord Halsbury L. C., 'is expressly within the discretion of the magistrates' ([1891] A. C. 178). And his lordship could see no possible reason, either *a priori* or in legislation, 'for limiting the discretion of the justices to the first grant of the licence.' The wants of the neighbourhood could be considered when determining whether a new licence should be granted; such topics could not become irrelevant in determining whether to renew a licence. But having thus stated the law Lord Halsbury significantly devoted the remainder of his judgment to an argument that the apprehended injustice to flow from it over the heads of licensed property holders would not arise. He laid stress upon the word 'discretion,' which he declared meant that 'something is to be done according to the rules of reason and justice, not

according to private opinion; *Rooke's Case* (5 Rep. 100); according to law, and not humour.' He quoted several instances to show the limitations of a discretionary authority, such as *Macbeth* v. *Ashley* (L. R. 2 H. L. Sc. 360), where the House of Lords had held that power to magistrates to shorten the hours during which public-houses might be open did not in that case authorize the magistrates at a particular place to close houses at an earlier hour than was customary in surrounding localities, merely because they chose to do so, and apart from any special needs. Lord Halsbury did not think the danger of indiscriminate or arbitrary withdrawal of licences was at all likely to arise. 'The legislature has given credit to the magistrates for exercising a judicial discretion—that they will fairly decide the question submitted to them, and not by evasion attempt to repeal the law which permits public-houses to exist, or evade it by avoiding a plain exposition of the reasons on which they act' (p. 181). And, finally, he pointed out that the fact that a year before the magistrates had considered the house to be wanted 'would be likely to limit the inquiry to the conduct of the house and the character of the licensee, and, perhaps, the condition of the house, but as matter of fact and not as matter of law at all.' Lord Bramwell, again, agreeing with Lord Halsbury's judgment, pointed out that the legislature had 'most clearly shown that it supposed, contemplated, that licences would usually be renewed; that the taking away of a man's livelihood would not be practised cruelly or wantonly. True, and because it showed that plainly, it may have felt it safe to leave an absolute discretion with the justices, a discretion that would be discreetly exercised' (p. 184).

The *Sharp* v. *Wakefield* decision came, then, to this. In the ordinary course, and apart from unfitness of the licensee or his premises, the yearly licence would be renewed as often as it fell due for renewal, but there was in the justices a power (to be exercised with judicial discretion and in the spirit of the licensing legislation under which the public-house system was established) to refuse renewal for other reasons, as, for example (though other examples are hard to think of) that the house was no longer wanted, or that it had become too remote from police supervision for the security of good order and the observance of the law. The disturbing element in the decision was that it declared that licence-owners must contemplate a further risk of loss than that arising out of the possible misbehaviour of a tenant—the risk, viz., that a bench of licensing justices, inimical to public-houses, might get rid of a licence on the ground that they thought it no longer wanted, even though in point of fact the owners saw their way to a profit out of it. But it is clear also that the judgment does not support the new doctrine

that legally there is no right to expect renewal, and that justice would be satisfied even in the case of the withdrawal without compensation of the licence of a well-conducted and prosperous house, if the owner be given a few years' grace in which to prepare for the blow. That would involve the 'indiscriminate and arbitrary withdrawal' which Lord Halsbury in his judgment had scouted as outside the range of probability, as well as of justice and the spirit of the licensing laws.

A string of subsequent decisions, both in the common law and the Chancery Courts, shows that the courts did not interpret the *Sharp* v. *Wakefield* judgment in the sense now adopted by certain publicists, but that they continued to regard as one of the essential components of licensed property the confident expectation of indefinite renewal of the licence. The first case I will cite in illustration is *Belton* v. *London County Council* (62 L.J. Q. B. 222). This was a case stated under the Arbitration Act, 1889. The owner of a public-house, let for an unexpired term of twenty-six years, had received notice from the London County Council to treat for its compulsory purchase. In the arbitration his counsel tendered evidence for the purpose of showing the present market value of the reversionary interest in the house as then existing, being licensed as a public-house. Counsel for the Council objected to this evidence on the ground that the licence was not an element of value attaching to the premises in reversion after twenty-six years, and contended that, for the purpose of estimating the reversionary value the umpire must estimate the rental value of the premises as a house and shop apart from the question of whether they would then be licensed premises. This was the question for the determination of the Divisional Court, which (Day and Collins JJ.), without calling upon the claimant's counsel, decided against the County Council's contention. Day J. stated that the Council's 'proposition seems to me to involve a very grievous injustice.' And the concluding passage of the judgment of Collins J. may be cited:—

'Mr. Moulton admits that the possibility of the premises being used as a public-house ought to be taken into consideration, but he says that in appraising that possibility you are not to take into consideration the probability. That appears to me to be an absolutely impossible contention. I cannot conceive how any one can put a value upon the possibility without arriving at some judgment in his own mind as to the probability. If that be so, we have the clear authority of the Court of Appeal that in estimating the probability you are justified in taking into consideration the fact of the house being used as an hotel and public-house. Now that is a larger way of putting the fact that it is licensed, because you cannot carry it on either as an hotel or public-house without

a licence. Therefore, even on Mr. Moulton's own authority, one finds that it is clear law that the element of value which would govern its price in the market is also the element of value which the arbitrator is justified in taking into consideration in assessing the compensation to be paid upon compulsory purchase.'

We have here, therefore, a decision that the probability of indefinite renewal of a licence is such a legitimate and well-established factor in the value of licensed premises that a public body compulsorily purchasing the premises must pay, even to a reversioner after a twenty-six years' lease, a price calculated upon the probable permanence of the licence.

Two years later came the important equity decision in *In re Earl Somers Deceased, Cocks* v. *Lady Henry Somerset* (11 T. L. R. 567; 39 Sol. J. 785). In this case the defendant, as tenant for life of a property including the White Hart Hotel, Reigate, had sought to lease this house with a covenant that the lessee should not use the premises for the sale of intoxicating liquors. For years previously a licence had been held in connexion with the house, and the carrying out of such a covenant would involve the lapse and loss of the licence. That was the defendant's intention; but the trustees of the settlement issued a summons for a declaration that she was not entitled to exercise her powers as tenant for life under the settlement by granting a lease of these or any other licensed premises containing any covenant or provision to the effect that the demised premises should not be used for the sale of intoxicating liquors, or not containing proper provisions for the continuance or renewal of all licences which at the time of the demise might be held in respect of the demised premises. Chitty J. made the declaration asked for. Here, then, the permanent character of a licence was so well recognized that trustees of a settlement are allowed, on behalf of the remaindermen, to interfere for the protection of licences attached to property which may not come into the remaindermen's possession for many years.

Another and more recent case from the common law courts may be cited, *In re an Arbitration between Chandler's Wiltshire Brewery Co. Ltd. and the London County Council* ([1903] 1 K. B. 569). This case amplifies the principle animating *Belton* v. *London County Council* (*ubi supra*). The plaintiff company was assignee of a lease of a certain beer-house. It underlet the premises for a term of twenty-two years, less ten days. The underlease contained a covenant 'tieing' the house. The London County Council sought afterwards to acquire these premises compulsorily under the Housing of the Working Classes Act, 1890, and, before the arbitrator appointed to assess the compensation payable to the various interests involved,

the brewery company claimed the fair market value of its interest in the premises, having regard to the said covenant and the profit to accrue therefrom. The County Council resisted the claim, contending that the company was only entitled to compensation for the loss of its interest in the land, and the arbitrator stated a case for the High Court to determine whether the company was entitled to be compensated in respect to the damage sustained by it by reason of the determination of the covenant, which would be a substantial amount; if the company was not so entitled, the sum payable would be only nominal. Wright J. decided that the tieing covenant ran with the land, and that the lessors were entitled to its value. But as such a covenant would be meaningless, would have no basis to work upon, apart from the continued possession of the licence attached to the house, it is clear that the Court contemplated the continuance of the licence, and regarded the licence as a sufficiently stable thing to justify computing the value of a covenant necessarily depending upon it on the assumption that it would so continue during the twenty years or so of the term in the lease.

As bearing on the attitude usual in the Courts in the days before the decision in *Sharp* v. *Wakefield* may be cited an extract from the judgment of Lindley L. J., in *The Queen* v. *Licensing Justices of Crewkerne* (21 Q. B. D. 87). The case then before the Court of Appeal was an appeal from the Divisional Court discharging a rule nisi for a mandamus to renew a six-day licence without inserting it in the condition that the premises should be closed during the whole of Sunday. The original licence-holder had had granted to him (upon his own application) a six-day licence. In a later year a transferee of the licence, when making his application for the annual renewal, asked for an ordinary seven-day licence. This the justices refused, though they were willing to renew the six-day licence. The Court of Appeal, following the Divisional Court, held that the justices were entitled to refuse the seven-day licence, or, to put it more correctly, to refuse to renew the licence without the Sunday closing condition. And Lindley L. J. said: 'I think that the justices were entirely justified in telling the appellant that if he wanted to open his house on Sunday he must make a substantive application for a seven-day licence. If he had done so they would have been able to exercise the absolute discretion as to granting it which is vested in them by the Act of Parliament.' Clearly the learned Lord Justice was of opinion that the 'absolute discretion' of the justices to refuse a licence applied only to new licences. That it was not so limited the House of Lords' decision in *Sharp* v. *Wakefield* (at the time of the above-cited case going through the Divisional Court) shows, but the Lord Justice's expression also shows that he

did not contemplate the justices refusing, or even having power to refuse, the renewal of a licence, except on the well-known grounds of unfitness of applicant or premises.

One other case may be cited, which, though a nisi prius case not reported professionally, is valuable as showing the attitude of judges of the High Court, even after the *Sharp* v. *Wakefield* decision. (I take the report from the *Brewing Trade Review*, 1893, p. 105.) The action is entitled *Hardy and another* v. *Ind, Coope and Co.*, and was tried before Day J. at the Derbyshire Assizes in March, 1893. The plaintiffs were the executors of the owners of an inn at Derby. They had let the house to the defendants, the lease containing the usual covenant that the house should not be so conducted as to endanger the licence. The defendants put into the house as tenant a man who was fined for conducting it as a house of ill-fame, and at the following Brewster Sessions the justices refused to renew the licence. The plaintiffs, stating that the loss of the licence depreciated the value of the property by £2,200, sued the defendants for damages. The jury found for the plaintiffs, damages £2,000, for which amount judgment was entered. Here, again, we have the same question posed as in the other cases: if at the end of each licensing year the holder's interest in the licence ceases, upon what ground can the Courts treat a man as damnified, and to the extent of the future loss of profit occasioned thereby, by a circumstance which precluded renewal of the licence?

It is submitted, then, that, even apart from the Licensing Act of 1904, which does unquestionably recognize a vested interest in the continuance of a licence, such an interest has grown into existence through the practice of generations, recognized alike by the State as taxing authority and by the Courts of Law and Equity. A licence-holder has a right to the renewal of his licence; though that right is (or was prior to 1905) liable to be defeated through the exercise of the discretion of the licensing justices—but such discretion must be a real exercise of discretion, made, not with caprice or arbitrarily, but in accordance with the general scheme of the licensing legislation of the country. This expectation of continued renewal of an existing licence is a genuine property right, and the destruction of it by the State without compensation would be, like the destruction of any other property rights, an act of confiscation.

ERNEST E. WILLIAMS.

CONTRABAND OF WAR[1].

WHEN I had the honour, in October last, of addressing the Berlin Conference of this Association upon the proposal that private property at sea should be exempted from capture by the enemy in time of war, I had occasion to insist upon the impossibility of a final judgment upon that question without a prior or contemporaneous compact between the Powers as to contraband of war. So long as international law is in its present fluid state on this subject; so long as any belligerent can quote precedent for treating as contraband, if it pleases him, the most important articles of sea-borne commerce, and can proscribe at will the property of his enemy in provisions and fuel, and the raw material of manufacturing industry, such as cotton, steel, copper, and machinery; a concession of immunity from capture, thus overridden, is scarcely worth the asking. The proposal of the exemption from capture of private property at sea, to which, even without such a drawback, many feel grave objection, loses, as I then ventured to point out, its best attractions for those maritime nations whose needs in the matter of food and of foreign materials for its industry might otherwise lead them to favour an international scheme assuring to them in war-time the continuance of importation in their own merchant ships. By the proceedings at the Hague Conference, so far as they have been published, and as I understand their drift, I am confirmed in the opinion that, if only for the reasons which I have given, a definite international conclusion as to contraband of war has now become a matter of primary and fundamental importance. It is not, however, only, or chiefly, from its connexion with the regulation of the treatment in war of property at sea belonging to the subjects of the two belligerent Powers that its importance is derived. The law and practice as to contraband of war vitally affect the relations between each of the belligerents on the one hand, and all neutral States and the trading and shipowning subjects of those States on the other. The commercial intercourse of the world, as well as the material interests which it creates and feeds, is not only great and still growing in extent, magnitude and sensitiveness, but has hugely altered in its character and conditions since, with the prevalence of maritime

[1] Read at the meeting of the International Law Association at Portland, Maine, 1907.

warfare and the contemporaneous development of maritime commerce in the course of the eighteenth century, the question of contraband first emerged out of insignificance and became the mother of many diplomatic controversies. New and more difficult problems have arisen. Scientific inventions, especially in regard to the use of steam, electricity, and explosives, have marvellously transformed the methods and machinery both of trade and of war. But the present condition of international law in regard to contraband remains unchanged; it still can properly be described only as a condition of chaos. As it now stands, there is no recognized rule which limits or controls the category of contraband which the official declaration of a belligerent may properly notify to the neutral world. There is no recognized rule which classifies contraband or works out the Grotian precept 'distinguendus est belli status.' There is no recognized rule which prescribes to a belligerent captor the appropriate treatment of the property which, because contraband, is liable to his interference. In what circumstances, if any, the captor may legitimately destroy either the neutral ship with her cargo, as Admiral Jassen did *The Knight Commander*, in June, 1904, during the war with Japan; when he may confiscate and is not confined to a right of pre-emption or merely temporary detention; on what basis, if pre-emption is adopted, the price or compensation shall be assessed; within what limits the English and American doctrine of 'continuous voyage' ought to be held applicable; as to all these questions which require rules founded upon accepted principles, not only is there no international agreement, but in regard to some of the most important of them, pronouncements of judges and jurists may be quoted in support of conflicting or widely divergent views. The same State, guided by its interest at the moment, has, when neutral, complained diplomatically of conduct in accordance with a doctrine of seizure which it had itself asserted as a belligerent, or has, when a belligerent, refused to adhere to its own earlier declarations made in time of neutrality or peace.

Quite recently, for example, at the outset of the Russo-Japanese war, the Russian Government in its official Notification of Contraband, made February 14, 1904, included coal amongst a long list of articles to be treated as unconditionally contraband. The same Government, at the West African Conference in 1884, had refused categorically to consent to any treaty convention or declaration of any kind which would imply the recognition of coal as contraband of war. In 1885, France, which has generally stood out for the immunity of provisions, proclaimed rice for Chinese ports contraband of war.

It needs no reflection to see how seriously such a state of things must affect the world's comfort and commerce. The reckless exercise by a powerful maritime belligerent of his present unquestionable licence to declare as contraband the most necessary articles of food or materials of manufacture might conceivably ruin a great trade between a neutral country and the enemy of that belligerent; the exercise, however fair and scrupulous, of such a belligerent's right of visitation and search, in the enforcement of his declaration, would certainly cause incalculable hindrance to the punctual transit of the mails and passengers of the neutral world along the highways of the sea. But this is only a part, and not the worst part, of the existing position. It teems with possibilities of danger to peace. As Mr. Lawrence has observed, whilst the position continues, we must have constant bickerings between belligerents and neutrals; and if, unhappily, a great maritime war broke out, powerful commercial States might find themselves drawn into hostilities almost against their will. Public opinion in any of such States might be dangerously excited by a belligerent's captures, on account either of their number or, as in the case of mail steamers or great ocean liners, by their importance; and it is, I fear, too much to hope that in any country there would be no 'yellow press' to fan the flame of popular passion. In such circumstances it would be always difficult, and sometimes, perhaps, impossible for the two States concerned to discuss with adequate calmness the complicated questions of international law to which the exercise of the right of capture by the belligerent State had given birth. The wars of the last fifty years—to go back no further—in which maritime Powers had been engaged, have furnished illustrations which the memory of my hearers makes it superfluous to specify. More than once the action of a belligerent captor has led to a dispute between the neutral and the belligerent State which, but for the tact, forbearance, and good sense of those who guided the counsels of the governments interested, might easily have led to a lamentable enlargement of the area of war.

Clearly, then, we have a state of things which must not be suffered to continue; a state of things which, according to a well-known phrase, must be mended or ended; mended by framing, through the agreement of civilized nations, an equitable and reasonable code of contraband, binding, so far as International Law can bind, universally; or ended, by the abolition of the idea of contraband, so as to permit every kind of oversea traffic in neutral vessels between belligerents and neutrals to continue during war without any restriction other than its exclusion from an enemy's port by an effective blockade.

It is this second solution for which, subject to the general acceptance of stipulations which will prevent a vessel nominally neutral but practically rendering auxiliary service to an enemy's naval forces from evading liability to be treated as a hostile warship, that, as I understand the statements appearing in the public Press, the representatives of Great Britain at the Hague Congress have indicated a preference. Such a proposition, coming from Great Britain, will no doubt receive the very careful consideration of the Powers. It presents, no doubt, great attractions. Under any system, however carefully planned and worked, the application of the principle of contraband must always be attended by serious drawbacks and difficulties. It can be enforced only by the exercise of a right of visitation and search, and this in itself means annoyance and delay to maritime traffic. Or, again, take the case of a vessel some small part only of whose cargo is contraband. What is to be done in such a case? Ought the neutral shipowner and the neutral owners of the bulk of the cargo to suffer without indemnity the loss which the seizure and detention of the vessel must inevitably involve? You cannot unload the vessel at sea to search for the suspected goods, of the nature of which the captain and officers may be honestly ignorant; and even if this were physically practicable, and if the neutral vessel had a right (as, I think, both Bluntschli and Calvo have asserted) to purchase the free continuance of her voyage at the price of abandoning to the belligerent whatever suspected goods she has on board, it is a right, as Hall (pp. 666–7) points out, which could not really be available. For, as Dana, whom Hall quotes, has observed :—

'As the captor must still take the cargo into port and submit it to adjudication, and as the neutral carrier cannot bind the owner of the supposed contraband not to claim it in court, the captor is entitled for his own protection to the usual evidence of the ship's papers and whatever other evidence induced him to make the capture, as well as the examination on oath of the captain and supercargo of the vessel. It may not be convenient to detach all the papers and deliver them to the captor; and certainly the testimony of the persons on board cannot be taken at sea in the manner required by law.'

Add to the inevitable drawbacks and difficulties in the practical administration of a law of contraband which I have just illustrated, the difficulty of obtaining and maintaining an international agreement as to the classification of contraband or as to the treatment of property seized, and the probability in the case of 'conditional' (or 'relative') contraband, of international disputes in regard to 'destination,' and to the application of the doctrine of 'continuous

voyage'; and no one can fail to realize that there is very much indeed to recommend, in the interest of peace and commerce, the total abolition of the system of contraband of war. Further, in regard to the question of policy, it must not be forgotten that the interest of a great maritime Power in the maintenance of the law of contraband is now much less than it used to be, and that it is likely to decrease in the future. The development of inland communication gives to all but insular States a practically limitless source of supply from the mainland in respect of provisions and war material for which in former times they were largely dependent on maritime importation.

At the same time, the Governments with whom rests the decision ought carefully to consider whether an agreement to abolish contraband and, subject only to restraint in the case of an effective blockade, to give virtual immunity to neutral commerce, would withstand the strain of a great maritime war. There appears to me to be wisdom in a remark of Sir John Macdonell in an interesting paper published in the Nineteenth Century, July, 1904, and entitled 'Questions on the Present War.' In reference to the cognate question of the cutting of telegraph cables by belligerents, he says:—

'I put less trust in rules which there may be an irresistible temptation to break or evade than in a proper system of compensation by belligerents, . . . meted out by a tribunal possessing general confidence.'

Will neutrals be prepared to punish a breach of the agreement not to molest neutral commerce? If not, will the fear of the disapprobation of other States operate as a sufficient curb upon the desires and passions of belligerents? Human nature being what it is, will the agreement have the requisite force of moral sanction to ensure its observance, where in the course of a hard-fought maritime campaign, one of the belligerents, at much cost of blood and money, has at last won an advantage, and sees neutral merchant ships pouring into all the unblockaded ports of his enemy the ammunition and supplies which will enable that enemy to recover from his exhaustion and protract the struggle? It is not for me to answer the questions which I have put. It is not my purpose in this paper either to advocate or to deprecate the abolition of the principle of contraband. I wish merely to place before this Conference the considerations which appear to me to affect either of the alternative remedies for the troubles in which the present state of the law involves the peaceful majority of the world whenever two of the great maritime nations are at war.

There is one rather curious result which, as it seems to me, would follow from the adoption of the proposal to abolish contraband, and which I should like to mention. In view of the decision in the Geneva Arbitration of 1872, it may, I suppose, be assumed that a neutral State will be held to have failed to maintain the standard of international duty who does not observe the first of the three Rules set forth in the sixth article of the Treaty of Washington of 1871. In substance, the neutral State must use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of any vessel which it has reasonable ground to believe is intended to be employed in carrying on war against a power with which it is at peace, and to use like diligence to prevent the departure from its jurisdiction of any such vessel. Great Britain by its Foreign Enlistment Act, 1870, renders liable to penal consequences any person within His Majesty's dominions, who without licence from the Crown does that which, according to the rule to which I have referred, it is the duty of every neutral Government to use due diligence to prevent; and I believe that other States have similar municipal legislation. Suppose contraband is abolished. Suppose, that is to say, a belligerent may not seize during transit by sea in a neutral bottom the cargo, though consisting of material which is of use in naval or military warfare, destined for an enemy's port, not being a port which is being effectively blockaded. Now, some of the most valuable vessels in modern maritime warfare, and especially for coast defence, are small in size—river gunboats, torpedo boats, submarine boats, and the like. Nowadays such vessels can, I believe, be constructed in parts, transported in parts on shipboard, and put together at their destination. As international law now stands, the ship or ships carrying such contraband of war might properly be seized by a belligerent during their voyage from the neutral port to the enemy's port, and the parts of the intended war vessel found on board might properly be confiscated as contraband. If the principle of contraband is abolished altogether, such parts must be allowed by a belligerent to travel by sea unmolested to his enemy's port, although the war vessel, if constructed as a whole at the neutral port from which the parts are separately shipped, could not be allowed by the neutral state to proceed to sea without a violation of the international duty.

If, in spite of the risk of international friction and complications, and the inconveniences to commerce which must under any conditions accompany the maintenance of a law of contraband, it is found that an agreement for its abolition is not practicable, and the system is to be mended and not ended, the nations have to consider in what direction and upon what lines its reform ought to

proceed. While submitting to this Conference at the close of this paper a few suggestions upon this point, I wish it to be clearly understood that I am not pretending to deal with the matter comprehensively or completely. I could not attempt to do so without an unwarrantable trespass upon your time and patience. There are important details of the subject, which I must leave untouched, such as convoy, the separate treatment of the contraband cargo and the ship which carries it, the 'analogies of contraband' (the carriage, that is to say, of dispatches bearing on the conduct of the war and of persons in the service of a belligerent) and the doctrine of 'continuous voyage.'

Let me preface what I am going to say by the observation that, in order to deal rightly with this question, we ought here, as in all cases where we are seeking to find a fair adjustment of conflicting interests, accurately to ascertain, at the outset, whether either side has the better presumptive claim to favourable treatment. I cannot help thinking that the popular conception of the status of the neutral trader has been to some extent perverted by a misunderstanding of the legal position of a belligerent in relation to contraband traffic at sea. There are, from Bynkershoek downwards, authorities, of whom I desire to speak with sincere respect, for a doctrine that those subjects of neutral States who are engaged in it, as owners of contraband cargoes or of the ships which carry them, thereby offend against international law, and that the belligerent who seizes the property during the voyage and procures its condemnation in the Prize Court is, as it were, an instrument for the just punishment of persons who are guilty of a breach of that law. So Heffter (I quote from the French edition, 1866, § 158) writes:—

'C'est sous l'influence de l'école de Bologne que paraît s'être établie la théorie d'après laquelle les neutres, par le transport des objets de contrebande, commettent une infraction envers la partie belligérante qui en souffre, et que les contrevenants peuvent être saisis et punis.'

And so again, § 161, the same writer speaks of 'le délit de contrebande de guerre.' Bluntschli (Droit International Codifié, French edition, 1874, § 801) expresses the same idea in the short statement 'Le transport de la contrebande de guerre est interdit.' And so, in the course of his judgment in *The Stephen Hart* (Blatch. Prize Cases, at p. 407), with which probably the American lawyers present are familiar, Judge Betts speaks of 'The guilty intention that the contraband goods should reach the port of the enemy,' and later on says, 'if any part of said voyage or transportation is unlawful, it is all unlawful.' Pratt, the learned author of a treatise on the law of contraband of war (London, 1861), goes so far as to assert

(p. xviii) that the illegality of traffic in which contraband articles are conveyed from a neutral port to a belligerent, at least where the articles are of direct, immediate use in war, is universally admitted. With due deference to these jurists and others, I doubt not, who might be cited, their theory of the transport of contraband in war-time constituting a transgression of international law, and of the relation in which the transporter stands to the belligerent according to that law, is, in my humble judgment, incorrect. I believe the true view to be that international law recognizes the right of the subjects of any state to traffic across the seas with either belligerent; but it recognizes also the existence of a right in a belligerent to prevent, if he can, the supplies from reaching his enemy; and it endeavours to reconcile the conflict of these two rights, through the consent of civilized states to permit belligerents to seize and in some cases to confiscate both the contraband cargo and the carrying ship, without thereby giving just cause of complaint to the State, the property of whose subject has thus forcibly been dealt with. So Kent, in his Commentaries (12th ed., vol. i, p. 142), writes: 'The rights of the neutral to transport and by the hostile Power to seize are conflicting rights, and neither party can charge the other with a criminal act.' So Hall (International Law, 5th ed., p. 665), in dealing with the practice of pre-emption, speaks of it as a 'mitigation of belligerent *privilege*,' and at p. 653 quotes Dana's note to Wheaton, No. 226:—

'The intent of the owner is not the test. The right of the belligerent to prevent certain things from getting into the military use of his enemy is the foundation of the law of contraband; and its limits are in most cases the practical result of the conflicts between this belligerent right on the one hand and the right of the neutral to trade with the enemy on the other.'

'Every belligerent,' says Mr. Lawrence in his work on the Principles of International Law (p. 599), 'may capture goods of direct and immediate use in war, if he is able to intercept them on their passage to the enemy in any place where it is lawful to carry on hostilities. But neutral merchants may trade in arms, ammunition, and stores in time of war as well as in time of peace. Thus a conflict of rights arises; and it is the task of International Law to make some compromise between the admitted claims of belligerents on the one hand and neutrals on the other.'

I may be permitted, I hope, to make one more quotation, not only because it is of the language of an eminent living jurist, but because it puts so very neatly the proposition which ought always to be kept in view when the legal and the moral worth of the pretensions of belligerents in this matter of contraband are being considered:—

'The rule of international law upon the subject,' writes[1] Professor Holland, 'may, I think, be expressed as follows: "A belligerent is entitled to capture a neutral ship engaged in carrying contraband of war to his enemy, to confiscate the contraband cargo, and, in some cases, to confiscate the ship also, without thereby giving to the Power to whose subjects the property in question belongs any ground for complaint." Or, to vary the phrase, "a neutral Power is bound to acquiesce in losses inflicted by a belligerent upon such of its subjects as are engaged in adding to the military resources of the enemy of that belligerent." This is the rule to which the nations have consented, as a compromise between the right of the neutral State, that its subjects should carry on their trade without interruption, and the right of the belligerent State to prevent that trade from bringing an accession of strength to his enemy. International law here, as always, deals with relations between States, and has nothing to do with the contraband trader, except in so far as it deprives him of the protection of his Government. If authority were needed for what is here advanced, it might be found in Mr. Justice Story's judgment in *The Santissima Trinidad*, in President Pierce's message of 1854, and in the statement by the French Government in 1898, with reference to the case of the *Fram*, that "the neutral State is not required to prevent the sending of arms and ammunition by its subjects."'

This being the true view of the relative position of belligerents to neutral traders according to international law, it appears to me that the burden of proof may justly be held to lie upon those who seek, in framing any international agreement, to extend the application of the privilege of the belligerent to articles other than those which may fairly be held to be included in the category of arms and munitions of war.

How it has come about that the law relating to contraband has remained, even to our day, in so chaotic a condition, it is not difficult to see. In the old days of violence, when even in the centres of European civilization might generally meant right, a powerful belligerent in his treatment of neutrals was, no doubt, generally a law unto himself. As late as 1588 Albericus Gentilis, the learned Italian who became Regius Professor of Law at Oxford, in his work De Jure Belli (l. 2, c. 18, p. 227 (1877 ed.)) wrote that it has been very common[2] to hang persons who try to introduce supplies into besieged towns; and rightly, if they are mercenary merchants, because they are not helping their country, but have been led by greed so far as to despise a power stronger than themselves. Westlake, who refers to the passage, adds that apparently neutral

[1] The 'Times,' 29 Nov., 1904, cited by Smith and Sibley, pp. 431, 432.
[2] 'Nec semel, nec noviter.'

merchants are intended by mercenaries. What happened on land no doubt happened on the seas. In the seventeenth and eighteenth centuries, when a greater desire for orderly conduct in international dealings began to prevail, treaties relating to contraband were concluded between individual states, containing such special stipulations as it suited the contracting parties at the particular juncture to approve. Hall (p. 642) quotes an opinion of Sir Leoline Jenkins to the King of England in 1674 upon a case in which English pitch and tar, carried in a Swedish vessel, had been captured and carried into Ostend for adjudication. In his report the great English authority of his time on maritime International Law observed:—

'I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and unconditionally subservient to the use of war, except it be in the case of besieged places, or of a general certification by Spain to all the world that they will condemn all the pitch and tar they meet with.'

It is this last-mentioned circumstance that has in no small degree served, down to the present day, to keep the question of contraband in an uncertain and disorderly condition. Every maritime nation at the commencement of a war has claimed to be entitled to do that which Sir Leoline Jenkins, in the passage which I have cited, says might justify Spain in seizing the pitch and tar upon the Swedish vessel. It has exercised the right to declare, or notify, or certify, by proclamation of State, that it will treat such and such things as contraband, and so to add, at will, to what I may call the generally accepted Grotian classification of absolute contraband—the 'res quae in bello tantum usum habent'—whatever articles the nature of a particular war or the circumstances of the war, in respect of their own needs or the needs of their opponent, seemed to make it opportune to seize and confiscate, if found on shipboard and proceeding to a port of the enemy. In the course of the judgment of the English Court of Admiralty in the case of the *Med Gude Hielpe*, in 1750[1], it was expressly laid down that 'Sovereign princes at war may declare such and such things to be contraband, and after notice to their allies, their subjects may certainly seize them.' The same court, in the judgment in the *Fortune de la Mer* (1745), stated, 'The Crown may make a declaration what shall be contraband, and then every convener will be liable to confiscation' (Pratt, p. 40).

[1] Not reported, except in Pratt on 'Contraband of War,' p. 198, but cited in the *Staats Embden*, 1 C. Rob. 29, and *The Maria*, 1 C. Rob. 373.

During the period which I am considering, Great Britain, independently of special treaty stipulations, sought to enforce, by virtue of her naval supremacy, a claim to confiscate, as contraband, both provisions and naval stores. In the latter class she included practically all articles which were made use of in the navigation of the time, such as timber, metals, sails, tar, and pitch.

In the case of *The Notra Seignora de Pentha de France*, in 1746, the Prize Court in its judgment stated, 'Provisions are and always have been esteemed contraband' (Pratt, p. 93).

But even as to those classes of cargo the practice of the Prize Court was to some extent elastic. If the goods were the product or growth of the exporting country, if they were in the native state, as hemp or corn, or metal not in the form of manufactured goods, or if the port of destination was not either in general character or at the moment a port of naval equipment, then, as appears from the well-known judgment of Lord Stowell in *The Jonge Margaretha* (1 C. Rob. 189), the Court of the captor might, in accordance with the practice of nations, show some indulgence to the neutral trader. The form which the indulgence sometimes took was 'pre-emption,' whereunder the propriety of the seizure was affirmed, but allowance was made to the owner for the original price actually paid by the exporter, plus his expenses, and plus the profits which the Court deemed fair and reasonable[1], calculated usually at 10 per cent. on the first cost. This system of pre-emption, although undoubtedly favourable to the neutral owner of goods which might fairly be treated as within the category of contraband, was essentially unsatisfactory, because of uncertainty in application, and other nations naturally objected to it when applied to goods, such as corn, which according to the Grotian classification are prima facie not contraband of war, and which were in fact in course of transit to open commercial ports. When by an Order in Council of 1795 Great Britain authorized her warships to bring in for pre-emption all vessels laden wholly or partly with corn, flour, meal, or other food-stuffs, and bound to any port in France, the American Government strongly objected; the Order was revoked, and, by the decision of the mixed commission appointed under the treaty of 1794, compensation was awarded to the American owners of vessels and cargoes seized by British cruisers under the Order in Council[2].

I have, I think, said enough to show that international law in regard to contraband had no settled principle during the period which may be treated as ending in the second decade of the nineteenth century. The Grotian classification appears to have revived,

[1] See *The Haabet*, 2 C. Rob. 174.
[2] See Wheaton, pp. 660–7; Kent, vol. i, pp. 138–9.

in a sense, theoretical recognition, but there was no universal rule or distinction in regard to *res ancipitis usus*, the policy of each nation (in the absence of treaty) dictating its preference in practice for an extensive or for a limited category, and applying the test of distinction very variously [1].

In the period which has since followed, during which sea traffic, for purposes both of war and of commerce, has been revolutionized by the application of steam as the motive power, and the methods of belligerency on land and sea by the uses of electricity, and by the invention of new forms of warfare, the difficulty and the need of solving the contraband problem have greatly increased. A network of railways has connected all the principal places of adjoining countries, and complicated the question of the 'destination' of sea-borne goods. We have still the questions as to food stuffs, naval stores, and horses. Fuel and marine machinery, such as marine boilers and engines, and railway and telegraphic plant, and the materials and machinery required for their manufacture, have been added to the list of disputable contraband.

I must confine myself, on the present occasion, to indicating some of the more important points of existing controversy.

France in 1885, as I have already had occasion to note, claimed during a war [2] with China to treat rice, if destined for ports north of Canton, as contraband. In 1904, Russia, in addition to articles which might fairly be classed amongst munitions of war, proclaimed as contraband rice and provisions, raw cotton, any kind of combustible, such as coal, naphtha, alcohol, and similar substances, horses and beasts of burden, and materials and objects for telegraphic and telephonic installations, or for construction of railways generally, boilers and every kind of naval machinery mounted and unmounted. After the protests of both the British and American Governments, Russia modified her proclamation so far as regards rice, provisions, horses, beasts of burden, and other animals, by agreeing to treat them as contraband only when destined either for the Government of the enemy or its Administration, or the army of the enemy, or for Government purveyors. In regard to coal, during the Franco-German war of 1870, the Prussian Government remonstrated with Great Britain for permitting the exportation of coal to France, whilst France on her part did not then treat either provisions or coal as contraband. Great Britain has always treated coal as conditional contraband, that is to say, as contraband when destined for the use of the enemy's forces. Pratt (p. liii) refers to

[1] Kent states (vol. i, p. 140) that the doctrines of the English prize law appearing in Lord Stowell's judgment in *The Jonge Margaretha* were essentially the same as those adopted by the American Congress in 1775.

[2] [The claim no doubt amounted to the assertion of a state of war: otherwise, if I remember right, there was no regular war between France and China.—F. P.]

a Ministerial declaration in Parliament, made by Sir James Graham as early as 1846. In August, 1904[1], Mr. Balfour, the Prime Minister of the day, addressing a deputation representative of British shipping interests in regard to the Russian proclamation of 1904, made this important statement of the British view:—

'The principle we have laid down as we believe in absolute conformity with the laws and practice of nations, is that the warlike stores carried to a belligerent are undoubtedly contraband of war, that coal carried to a belligerent for the purpose of aiding him in his warlike operations is undoubtedly contraband, that foodstuffs carried to an army in the field, or to a beleaguered fortress, or carried to a foreign country to aid the troops or fleet, are contraband, but that we do not accept the doctrine which is apparently laid down—and I lay stress on the word "apparently" because there is some ambiguity about it—we do not accept the doctrine apparently laid down in the Russian notification, that coal, food stuffs, cotton, and many other things are absolute contraband of war, and that the mere fact that they are found on board ship justifies the seizure of the goods, and, in certain circumstances, the capture and retention and confiscation of the vessel.'

The British Admiralty Manual of Prize Law, 1888 (pp. 18–20), contains what may be termed a full list of articles absolutely contraband, viz. arms, machinery for manufacturing arms, ammunition and material for ammunition, military and naval stores, and marine machinery and gear, and iron manufactured for shipbuilding purposes—I need not enumerate all the details—and then proceeds to treat as only conditionally contraband—provisions, money, telegraphic materials and railway materials, coal, hay, horses, rosin, tallow, and timber.

I believe the American view to be substantially in accordance with the British as to provisions and coals, which constitute the most material subjects of conditional contraband, but to be possibly rather narrower as to the destination necessary to create the condition. In the Spanish American War of 1898 the Navy Department of the United States, in their instructions to blockading vessels and cruisers, included amongst articles conditionally contraband '*Provisions* when destined for an *enemy's ship or ships* or *for a place that is besieged*.' In the Protest by the American Government against the Russian proclamation in 1904, is to be found a memorandum as to destination:—

'Articles which, like coal, cotton, and provisions, though of ordinarily innocent, are capable of warlike use, are not subject to capture and confiscation unless shewn by evidence to be *destined to the military or naval forces of a belligerent*[2].'

[1] Smith and Sibley, 'International Law,' p. 214, quoting from the 'Times' of August 26, 1904.

[2] Smith and Sibley, p. 215; also in L. Q. R. xx. 339, 341.

In the well-known case of *The Peterhoff* (5 Wallace, 28), a case in which contraband goods had been shipped, and which with the earlier case of *The Bermuda* (3 Wallace, 514), and *The Stephen Hart* and *The Springbok* (Blatch. Prize Cases, pp. 387, 434, and 5 Wallace, 1), constitutes the group of leading American decisions on the question of 'continuous voyage' which has been recently revived by the diplomatic controversy between Great Britain and Germany in the cases of *The Bundesrath* and *The Herzog*, the Supreme Court of the United States (p. 58) laid down the law of America as it stands, I believe, to-day:—

'The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes:—

'(1) Articles manufactured and primarily or ordinarily used for military purposes in time of war.

'(2) Articles which may be and are used for purposes of war or peace according to circumstances.

'(3) Articles exclusively used for peaceful purposes. Merchandise of the first class, destined to a belligerent country or places occupied by the army or navy of a belligerent, is always contraband, merchandise of the second class is contraband only when actually destined to the military or naval use of a belligerent, while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege.'[1]

The views which the Governments of France, Germany, and Italy would hold at the present time as to the rights of neutrals trading with a belligerent in provisions and coal, and other articles *ancipitis usus* which are treated as conditional contraband in the British Admiralty Manual, I do not know. I have not seen any published statement of them.

The opinions of modern jurists seem only still further to illustrate the absence of any agreement on this question of contraband. In regard to provisions, Wheaton (fourth edition, pp. 663–5) appears to me, as is stated by Hall (fifth edition, p. 662), to confine the right to seize provisions on shipboard to the case of their being carried to a place which is being besieged or blockaded. But Wheaton's meaning is not very clearly expressed.

Bluntschli, § 807, asserts that it is contrary to the usages of war to seize as contraband victuals and other means of subsistence, even when they are destined for the enemy's forces; but he goes

[1] 5 Wallace, 58.

on to say that a besieging army has the right to prevent the entry of provisions into the besieged place. The same jurist, in another passage (§ 805), states that in regard to things *ancipitis usus* (including in that category clothing, money, horses, timber for shipbuilding, sails, canvas, iron plates, steam-engines, and coal), the presumption is that they are not intended for purposes of war, and that they must not be confiscated as contraband except under treaty rights or in the special circumstances that they are destined for war purposes, and are being carried for the purpose of giving aid and assistance to one of the belligerents. It seems plain from § 806 that Bluntschli's view is that, even in such circumstances, the belligerent can only pre-empt and not confiscate. Pothier's opinion is that provisions can be treated as contraband only when they are being conveyed to a place besieged or blockaded.

In regard to articles *ancipitis usus*, other than provisions, Ortolan[1], whilst insisting upon the importance of giving weight to the presumption of their purely commercial character, admits, in substance, that there may be exceptional circumstances in which their liability to be treated as contraband will arise.

I think I have said enough to indicate to you both the importance of the subject of contraband of war and the uncertainty in regard both to theory and practice, which attaches to its present position. One thing, at any rate, is quite clear: International law on this question is in a state which cannot be suffered to continue.

I am not so foolish as to hope that the study of the subject by one who is neither a statesman nor a naval or military expert enables him to do more than to offer for your consideration certain suggestions of useful reform; and I will conclude this paper by stating in separate propositions what those suggestions are.

1. A precise category of articles manufactured and primarily or ordinarily used for naval or military purposes in time of war should receive the sanction of international agreement; and by the terms of that agreement no nation should be permitted to treat, or to proclaim an intention to treat, as absolute contraband any articles outside that category. In order to obtain the assent of the Continental Powers of Europe, it might be necessary to narrow, so far as it relates to stores, the category of absolute contraband given in the British Admiralty Manual of 1888. In 1896 the Institute of International Law formulated a category which deserves the careful consideration of those statesmen who may try to endeavour to come to an agreement and to whom the arrangement of these important details must be left. There must, of course, be provision in

[1] See the note, Hall, p. 652.

the international agreement for opportunities of future revision in regard to the inclusion, in the category of absolute contraband, of newly invented or adapted instruments of warfare such as balloons and aeroplanes may prove to be.

2. It should be agreed that *res ancipitis usus*, including coal and provisions, might be treated as conditional or relative contraband only if proved by the captor, upon whom the burden of proof should lie, to be at the time of capture destined for an enemy's naval or military use; and such articles, if seized, should be treated as subject to pre-emption, and not in any case to confiscation.

3. If the captor, after a capture, fails to prove the right to seize the property as contraband, the owners of ship and cargo should be entitled to recover from the Government of the captor damages for all the natural consequences of the seizure, such damages to be assessed by an independent tribunal. It should, however, be open to the Government from whom such damages are sought to justify the capture and repel the claim for damages by proof that the seizure of the property was reasonably induced by the fraudulent or suspicious conduct of those on board the captured ship.

4. As the punctual service of mail steamers along the great ocean highways may be of supreme importance to several countries, an effort should be made to effect some arrangement satisfactory both to neutrals and belligerents in regard to the treatment of them. In his proclamation of April, 1898, the President of the United States declared that the right of search should not interrupt the voyage of mail steamers except in cases of grave suspicion. It is not likely that documents of strategical or political value will nowadays often be sent by post. Telegraphic communication by cipher renders, it has been truly observed, an examination of the contents of neutral mail-bags probably much less useful to belligerents than it once was. The loss to neutrals by the delay of the ship and the searching of the mail-bags being clear and great, and the gain to belligerents small and uncertain, the interest of the neutral ought to prevail. I suggest that mails duly sealed and authenticated by the postal officials who shipped them should be exempt from search, and, further, that the cargo and passengers on board mail steamers should be granted immunity from detention if the captain of the ship produced a consular certificate (or, if the ship had when on board cargo or passengers taken on board at ports of call, consular certificates from each port) vouching in regard to cargo its purely commercial nature, and in the case of passengers that they were not persons in the service of a belligerent.

5. I have a fifth suggestion to offer, which I trust might be found practicable, although I do not profess to be able even to indicate

a method of applying it. There ought to be found some way of limiting the locality of 'visitation and search.' The operations of the Russian cruisers, *Smolensk* and *Petersburg*, in the Russo-Japanese War were exceedingly troublesome to British commerce, and roused a very indignant feeling in my country. I have reason to believe that during the South African War the Germans complained of the search by British cruisers at Aden of vessels bound for so distant a destination as Delagoa Bay. Obviously there are difficulties in the way of defining zones or areas of search, but I cannot help thinking that something should and might be devised in that direction. Bluntschli (§§ 814, 819) states that the belligerent's right of visitation and search is not legal either in the territorial waters of neutral states or in seas which are distant from the seat of war ('dans les mers lointaines'). Whatever be the law, one would welcome the acknowledgment by the maritime Powers of their duty to try so far as may be practicable to spare neutrals that which, if there were many cruisers of the belligerents at many points of the globe, would become an intolerable nuisance.

I must now bring my remarks to a close. As I have already had occasion to say, I am conscious that I have been obliged to omit or treat cursorily some interesting features of the question. What I have chiefly tried to do within the necessary limits of my paper has been to draw your thoughts to the importance of its subject, and to the consideration of the difficulties which it has become the duty of the civilized world to solve.

W. R. KENNEDY.

[It is submitted that no satisfying result can be obtained so long as the problems of capture, blockade, and contraband are separately dealt with, whereas they are intimately connected.

If the general right of capture at sea were abolished, belligerents would at once be tempted to strain their rights as to both blockade and contraband.

Similarly, a definition of blockade favourable to neutral traders creates a temptation to extend the definition of contraband.

Abolition of contraband would conversely encourage laxity in defining and interpreting the conditions of effective blockade, besides making it harder to deal with the right of capture at any future time.—F. P.]

THE HAGUE CONFERENCE OF 1907.

TILL the voluminous 'Actes' of the recent Hague Conference shall have been officially published, and some progress shall have been made in the ratification of such of its products as may prove acceptable to the Governments concerned, any attempt finally to estimate the value of its labours would be premature.

In the meantime it may be worth while briefly to call attention to some of the salient characteristics of the working of the Conference, and of the conclusions at which it has arrived. There is no longer any mystery as to the actual wording of the various conventions, *vœux*, &c., which were embodied in the 'Acte final' signed by the Plenipotentiaries. As to the course of discussion, a good deal of information is derivable from the 109 numbers of the 'Courrier de la Conférence,' a journal which appeared almost daily from June 15 to October 20, under the direction of Mr. W. T. Stead and his foreign coadjutors, who managed to secure for it not only the quasi-official summaries of what passed in the several Committees and at the sittings of the full Conference, but also, though apparently against the wish of the authorities, the text of many documents printed for the use of the delegates.

Certain antecedents of the meeting at the Hague exercised great influence upon its proceedings. The Conference of 1899 had placed on record its desire, not only for a special Conference to revise the Geneva Convention of 1864 (which assembled, and accomplished its task, in 1906), but also for Conferences which should deal with:—the rights and duties of neutrals; the inviolability of private property at sea; and the naval bombardment of open coast-towns. These topics were all included in the proposal for a second Hague Conference submitted to the Powers, in April, 1904, by President Roosevelt. The programme circulated in April, 1906, by Russia, to whom the President had ceded the initiative in the matter, was somewhat wider in scope. It proposed for discussion: improvements in the three Conventions of 1899, relating respectively to arbitration, &c., to land warfare, and to hospital ships. It also suggested the drafting of a convention as to naval warfare, dealing with the bombardment of open towns; the laying of torpedoes; the transformation of private vessels into ships of war; the days of grace for enemy shipping; and the maritime rights and duties of neutrals, with

special reference to such topics as contraband, and the destruction of neutral prizes. This programme was maintained in the definitive invitation to the Conference issued by Russia on April 3, 1907; which, however, took note of the wishes of certain Powers to bring forward further proposals, e. g. for a limitation of armaments, and for setting bounds to the forcible recovery of debts due from a defaulting State.

The Conference, thus summoned, met at the Hague on June 15, and continued in session till October 19. One is struck, in the first place, by the approximation to a 'parliament of man and federation of the world' achieved by the presence of delegates from no less than forty-four Powers, as against the twenty-six which were represented in 1899. The difference is mainly accounted for by the arrival on this occasion of seventeen delegations from *l'Amérique latine*. In the second place, one cannot help remarking, in reading the available accounts of what took place, the unmistakable evidence afforded by them of the persistence of those underlying divergencies of national interest which must be reckoned with in all attempts to influence the development of International Law. The cynical militarism of some Powers was too often in sharp contrast with the sentimental humanitarianism of others. The new-comers from South and Central America seem to have devoted themselves principally to vindicating their claim to equality with the older Powers comprised in the family of nations. The work of the Conference was mainly done in four grand committees, dealing respectively with (1) arbitration and cognate topics; (2) warfare on land; (3) naval warfare; (4) the law of prize. The questions assigned to the fourth committee—viz. the exemption from capture of enemy private property at sea, the transformation of private vessels into ships of war, contraband, blockade, the permissibility of destroying neutral prizes—proved to be so contentious that practically no progress was made towards their solution. The result, on paper, of four months of conscientious discussion, relieved by interludes of eloquent declamation, is an *Acte final* containing no less than thirteen conventions, supplemented by one declaration, two expressions of opinion, five *vœux*, and one recommendation. Account must also be taken of debates upon proposals, some of which were flatly rejected, while others failed to receive sufficient support to justify their embodiment in conventions.

The total achievements of the Conference, positive and negative, and they are not inconsiderable, may perhaps be provisionally summarized as follows:

I. Certain proposals, long and persistently urged, have been, with more or less finality, respectfully relegated to Cloudcuckootown:

viz. those for general compulsory arbitration, for proportional disarmament, for the exemption from capture of enemy private property at sea.

II. A similar fate may be said to have befallen the startling proposal of Great Britain for the abolition of the doctrine of contraband, put forward, as it was, in a form which seemed to cut down the right of visit to the ascertainment of neutral or enemy ownership; as also her attempt to persuade the Powers to condemn unreservedly the sinking of a neutral prize.

III. Honest spade-work, presenting no serious difficulty, has been done for the improvement in details of the three Conventions of 1899, relating to the peaceful settlement of disputes; to war on land; and to the application to maritime warfare of the principles of Geneva. Under this heading may also be placed the new convention as to the rights and duties of neutrals in land warfare; the renewal for a limited period of the first of the Hague Declarations of 1899, relating to the use of balloons; and the accession of practically all the Powers, including for the first time Great Britain, to this, as well as to the second and third of those Declarations, dealing with expanding bullets and with asphyxiating gases, respectively.

IV. Useful new matter, coupled sometimes with a codification of customary rules, is contained in conventions as to: (1) the treatment of defaulting Governments (but the 'Drago doctrine' is not fully accepted); (2) the declaration of war (no provision is, however, made for an interval to precede the first blow); (3) bombardment of undefended coast towns (a condemnation of the naval manœuvres of 1888); (4) certain restrictions, already more or less customary, as to captures of ships, and treatment of their crews; (5) vague provisions of the same character, as to indulgence to enemy ships at the outbreak of war; (6) neutral rights and duties in a maritime war (a codification of certain widely accepted rules, much weakened by exceptions in favour of divergent national practice).

V. Agreements are entered into as to (1) the transformation of private vessels into ships of war, and (2) submarine mines; but their utility is much impaired by the refusal of some Powers to consent to certain restrictions upon their freedom of action in these matters.

VI. A convention for the establishment of a second Hague Tribunal was drafted, but not signed, in consequence of disagreement among the Powers as to the appointment of the Judges of the Court. It is, however, recommended for adoption, if, and when, that disagreement shall have ceased.

VII. An elaborate convention, in fifty-seven articles, for the establishment of an International Court of Appeal in Prize cases—the credit or discredit of which must be shared between Great

Britain and Germany—was voted by a majority of thirty-seven to one, with six abstentions, and some reservations, and has been claimed as the most remarkable result of the Conference. The claim might be sustained were there any prospect that the convention will be ratified. As it stands, it contains within itself the seeds of mortality, in the article which provides that, where International Law is silent, the Court is to decide 'in accordance with the general principles of justice and equity[1].' On the objectionable character of such a provision, as at once ambiguous, and empowering a Court, in which foreigners would be in a majority of eight to one, to adopt the continental rather than the British view on unsettled questions of prize law, the present writer does not here propose to add anything to what he has written elsewhere, both before and after the meeting of the Conference.

VIII. The Delegates finally recommend that the second Peace Conference should be followed, at an interval of seven years or so, by a third. They insist upon the need of a carefully prepared programme of work for the new Conference; and they suggest, as well they may, in view of their action in the matter of an International Prize Court, that a prominent place in that programme should be given to a codification of the laws and customs of war at sea.

T. E. HOLLAND.

[1] [These words would have meant, a century ago, the principles of Roman prætorian law supplemented by the generally accepted doctrines of the publicists from Grotius to Vattel, and probably some kind of systematic result might have been obtained on that footing, though hardly with unanimity. But I agree with Prof. Holland that at this day nobody knows in what sense they would be understood or applied.—F. P.]

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Laws of England. By the Right Honourable the Earl of Halsbury, and other Lawyers. London: Butterworth & Co. 1907. La. 8vo. In about 20 volumes (25*s.* net per volume in cloth). Vol. I (Action to Bankers and Banking). 647 and ccxviii pp. and index.

THE title-page of Lord Halsbury's work describes it as being 'A complete statement of the whole Law of England.' The noble and learned author concludes his introduction with the expression of a hope 'that when finished the work will furnish a complete statement of the Laws of England.' At present only the first volume has been published, and a reviewer of one volume can hardly be expected to prophesy whether the complete work will realize the hope of the author.

The work, of course, is not a code—much less the 'ideal code' which Lord Halsbury, at the outset of his introduction, admits to be an impossibility.

Nor is it, if a 'complete statement' of English law, a digest, according to the definition of that word in the report of the Commission issued in November, 1866, viz. 'a *condensed* summary of the law as it exists, arranged in systematic order under proper titles and subdivisions, and divided into definite statements or propositions, which should be supported by references to the sources of the law whence they were severally derived, and might be illustrated by citations of the principal instances in which the rules stated have been discussed or applied.'

Maybe, nevertheless, the present work is a digest. Maybe it is an encyclopaedia—although the author says it is not 'a mere encyclopaedia.' It may be said at once, to quote the introduction, that the result is or will be 'a number of *treatises* composed by learned lawyers, supported by the decisions of the great judges who have from time to time adorned the English Bench.' To this description may be added the statement that the titles of the treatises are arranged alphabetically; and that what is written in them is based upon reported cases and the statute-law. That many lawyers will prefer to have treatises on different subjects in separate covers can scarcely be doubted, but the fact that the names of about 1,700 original subscribers appear in the first volume is evidence that a great many persons are desirous of possessing a work framed on the lines above indicated.

Before reviewing the first volume it may be useful to give some of the names of those who are responsible for the supervision of the treatises and general editing of the work as a whole.

Lord Halsbury is, of course, the Editor-in-chief, and as a frontispiece to volume 1 there is an excellent portrait of him, sitting as Lord Chancellor. The 'Revising Editors' are as follow: for Equity and Chancery titles,

Mr. Justice Swinfen Eady, assisted by Mr. T. H. Carson, K.C., already well known as an accurate writer on the law of real property; for Real Property and Conveyancing, Mr. Arthur Underhill, one of the Conveyancing Counsel of the Court, and a well-known writer and lecturer on many legal subjects; for Common Law titles and Practice and Procedure, Master Willes Chitty, who is one of the editors of the Yearly Practice; for Local Government titles and Licensing, Mr. William Mackenzie, who has already written largely on the same and kindred subjects. Master Willes Chitty is also the 'Managing Editor,' and Mr. Humphrey H. King is the 'Assistant Managing Editor.' Mr. King has had great experience as the principal assistant-editor of, and a contributor to, the Encyclopaedia of Forms and Precedents, also published by Messrs. Butterworth & Co., who are justified in their selection of one upon whom very heavy work in connexion with their new undertaking must fall. There are also thirteen sub-editors. The treatises comprised in the first volume are as follows:—

Action—by Master Bonner, assisted by Messrs. Henry Stephen, H. L. Ormsby, E. A. Cohen, and F. R. Bush.

Admiralty—by Sir Gainsford Bruce, formerly a Judge of the High Court, Mr. C. F. Jemmett, and Mr. Registrar E. S. Roscoe.

Agency—by Judge William Evans (who wrote a most able book on the same subject when he was in practice at the Bar), assisted by Messrs. M. R. Emanuel and A. W. Baker Welford.

Agriculture—by Judge Austin, and Mr. J. Brooke Little, who is a skilled writer on legal subjects.

Aliens—by Mr. W. Ernst Browning (formerly a Judge in Jamaica), Mr. W. Haldane Porter (His Majesty's Inspector under the Aliens Act, 1905), and Mr. C. B. Gedge.

Allotments—by Mr. A. Macmorran, K.C. (a well-known writer on the Public Health Acts, and an expert in the dissection of the same), and Messrs. W. A. Willis and Sidney W. Clarke.

Animals—by Judge Baugh-Allen and Messrs. C. Willoughby Williams and E. T. H. Lawes.

Arbitration—by Mr. Justice Bray (who is said to have won his seat on the Bench by an able argument in the House of Lords) and the Hon. Malcolm Macnaghten (who is one of the authors of Rawlins and Macnaghten on Companies).

Auction and Auctioneers—by Judge Tindal Atkinson and Mr. H. M. Giveen.

Bailment—by Mr. Arthur Powell, K.C., and Mr. Wyatt Paine.

Bankers and Banking—by Sir John R. Paget, Bart., K.C. (who, it is believed, is the counsel *par excellence* of bankers in general).

The tables of cases, &c., have been compiled by Mr. H. I. Whitaker, Assistant Librarian of Lincoln's Inn Library.

It must not be supposed that everything coming under the letters A and B is dealt with in the first volume. Agreements, for instance, will come under the head of Contracts; and Adverse Possession comes, *longo intervallo*, under the far-off title of 'Real Property and Chattels Real.'

It is noticeable that a Judge of the High Court is selected, together with a barrister, to write about Inns, Innkeepers, and Intoxicating Liquors—or rather about the law relating to them—and that the Editor-in-chief will himself write the treatises on Parliament and Peerage.

To deal more particularly with the published volume, the best treatise is Sir John Paget's contribution on Bankers and Banking. It is well arranged and very clear. So far as the reviewer has tested it, it seems

complete. A reference to the auditing of banking companies' accounts is apparently omitted from the index (to the volume), but the subject is dealt with in paragraph 1,188.

The treatise on Agriculture is remarkable for its completeness and accuracy. The treatise on Agency is well arranged, and the writers of it have not failed to notice the criticisms of the much abused but not yet overruled case of *Bolton Partners* v. *Lambert*, 41 Ch. D. 295. The title Allotments is quite up to date, and contains a useful exposition of such part of the Small Holdings Act of last session as relates to allotments. The treatise on Animals is a remarkable compilation of law from sources widely apart. The subject of Arbitration is dealt with in a most able and compendious manner, and cannot but add to the reputation of its authors.

If the other volumes come up to the standard of the first one, the subscribers will ultimately be in the possession of a most useful work. If it does not attain the completeness which is expected of it, it will at any rate be an important step in that direction, and will, it is hoped, afford a good foundation for those who in the future wish to write separate treatises on many of the subjects with which it deals.

What adds greatly to the practical utility of the work is the table of contents prefixed to each title, and the fact that the whole work is divided into paragraphs will facilitate the labours of those who bring out future editions, and index them.

It is understood that it is proposed to publish yearly supplements during the completion of the work, bringing up to date the volumes already published.

As the books are divided into paragraphs, it would be better for the index to refer to them, and not to the pages, as in the first volume.

F. E.

International Law. Part II: War. By JOHN WESTLAKE. Cambridge: at the University Press. 1907. 8vo. xiv and 334 pp.

IT is now three years since we had the pleasure of welcoming the publication of the first part of this important work (L. Q. R. xxi. 184), of which the second, and concluding part, has just made its appearance. Two principal causes are mentioned by the learned author as having 'retarded this sequel to the volume of 1904,' viz. 'the necessity of bringing out a new edition of my Private International Law,' and 'the imminence of a second Hague Conference.'

The first of these causes reminds us that it was in connexion with Private International Law that Professor Westlake, half a century ago, won his first laurels in legal literature. This country had produced only the fragmentary treatises of Jabez Henry and John Hosack upon a subject which has of late years attracted so much attention, when Mr. Westlake, in 1858, introduced English readers to the labours in this field of Savigny and other continental writers. From Private International Law, Mr. Westlake's studies soon carried him on to International Law, properly so called; till, in 1869, in collaboration with certain Dutch and Belgian jurists, he founded the Revue de Droit International, now in its thirty-ninth year of issue, and has ever since remained one of its directors and contributors. He was also a foundation-member of the Institut de Droit International, and has published, in 1894, Chapters on the principles of International Law, and, in 1904 and 1907, the systematic treatise now under review.

The second reason given for such delay as has occurred in the publication of Part II has perhaps operated unfavourably upon the form of the work as an artistic whole. The bulk of the volume was, it seems, printed off before the recent Conference had commenced its sittings, even before the ratification of the new Geneva Convention of 1906, and might well have been published forthwith, as a statement of the existing law, irrespectively of possibly approaching changes. In point of fact, the book has been held over till the sittings of the Conference were so far advanced that some idea could be formed of the changes in International Law which may result from its labours; and an estimate of these possible changes has been added in the shape of a supplementary chapter of sixty-five pages. 'In consequence,' says the author, 'it will be necessary, in order to obtain a complete view of many subjects, to refer as well to the last chapter, in which the proceedings at The Hague are dealt with, as to the former portions of the volume.' This complication will of course be easily obviated in a new edition, in which so much of the, now apocryphal, matter of The Hague Conventions as shall, by ratification, have been received into the canon of International Law will have found its proper place in Professor Westlake's systematic exposition.

As it is, we must be content, and are most fortunate, to be presented with a freshly thought out and masterly survey of the law of war in ten chapters; six of which deal with belligerents, and four with neutrals. It goes without saying that every page of Professor Westlake's new book deserves the most careful attention. One finds in it far less of the *crambe repetita* of familiar propositions and instances than is usually encountered in treatises upon the subject. The whole field is covered, but the author presupposes in the reader some intelligent appreciation of the questions to be solved, and some aptitude for consulting, from time to time, works dealing with special branches of the science. Among the many acute remarks, suggestive of useful trains of thought, we may note what is said about Declaration of war, p. 23; 'war domicile,' pp. 50, 143; martial law, p. 88; the three Hague Declarations of 1899, p. 110; the population of devastated districts, p. 111; *Kriegsraison*, p. 115; the *Consolato del mare*, p. 123; capture at sea of enemy property, p. 130. Several chapters, especially ch. vi, 'on naval war between belligerents,' ch. vi, 'on duties of neutral States,' and ch. x, 'on Contraband of War,' contain a good deal of interesting historical matter; and the history is well up to date. For instance, the differences between French and English views, as to the stay of belligerent ships of war in neutral ports, which became so marked during the Russo-Japanese war, are duly discussed, pp. 205–15; as are the cases of the *Paquete Habana*, p. 134, and the *Knight Commander*, p. 319. With reference to the last-mentioned, much-debated, case, Professor Westlake gives a studiously balanced opinion, but would apparently not have concurred in the unqualified assertions, made by the late Government in both Houses of Parliament, to the effect that the sinking of the vessel was 'a gross violation of International Law.' He would, however, have agreed with Sir Ernest Satow 'when he denied the existence of any established international practice of destroying neutral prizes, and refused an internationally binding character to the maritime regulations of certain States, enumerating the cases for destroying captured ships.' It may be remarked that the critics of the line taken by the British Government in this affair did not go so far as to deduce from the regulations of four great maritime Powers an international sanction for the practice in question. Their contention was rather that the regulations

made, and acted on, by these Powers, in the absence of clear evidence to the contrary, negatived any international prohibition of that practice.

The supplementary chapter (xi) deals with the effect produced upon the rules of warfare by the substitution of the Geneva Convention of 1906 for that of 1864, and with the possible effects upon those rules of the work of The Hague Conference of 1907.

T. E. H.

The Law of Torts: a treatise on the English Law of Liability for Civil Injuries. By JOHN W. SALMOND. London: Stevens & Haynes. 1907. 8vo. xxviii and 507 pp. (18*s.* net.)

THE subject of Torts seems to be a very favourite one with legal writers. Mr. Salmond's book is the tenth treatise dealing with Torts which has been published, either as a new book or in a new edition, within the last four years. Mr. Salmond's book, however, has an interest of its own; for it comes to us as an English law-book from the other side of the world. It is written by a practising member of the New Zealand bar, and, moreover, is printed in New Zealand, though it is given to the world by well-known English publishers. A peculiarity of it is that, though well posted in the latest English cases, it does not refer to the New Zealand decisions, some of which, at least, might with advantage have been noticed.

The standard of fullness and accuracy which has been attained by Mr. Salmond well entitles him to contend for favour with his nine contemporary rivals. If his book does not throw much new light on the moot problems of law, it yet presents the results attained in the subjects treated of in a particularly concise and clear way.

If Lord Halsbury's Encyclopaedia (or whatever it ought to be called) had been published earlier, we might have concluded that the method Mr. Salmond has adopted in his arrangement had been suggested by the recommendations to contributors in that work. Mr. Salmond states the law as he conceives it to be in numbered paragraphs, with illustrations from the cases; and in the event of an apparent conflict between them the competing cases are brought into juxtaposition and distinguished, or grounds of preference are shortly indicated. If the authorities are too tangled to admit of any certain rule being elicited, a note, often of considerable acuteness, is appended. The whole is well, carefully, accurately, and thoroughly done. Indeed, had this book been published thirty years ago it would have marked a distinct advance on anything previously written upon torts, but the last thirty years have witnessed a revolution in law-book writing, and the standard now required is so far in advance of what it once was that Mr. Salmond must be content to take his place as one of a number of very capable writers. Mr. Salmond's style, though clear, is a little dry. This is due partly to his aphoristic method of treatment, and also partly to his keeping in view the advantage of fullness with brevity. Sometimes, perhaps, he falls into a kind of writing that is not quite accurate, as when he says (at p. 331) that it is presumably a trespass 'to kill a dog by offering it poisoned meat.'

Sometimes his expressions, from want of shading, convey a too absolute meaning. To say, for example, as he does (at p. 49) of *Thomas* v. *Quartermaine*, 18 Q. B. D. 685, that since Lord Herschell's disapproval of it in *Smith* v. *Baker* [1891] A. C. 366, it must 'be taken to have been wrongly decided,' is giving a not wholly accurate impression of what occurred. Whether from intention or by misadventure, the law laid down in *Smith* v.

Baker was entirely new law. Till that decision, a man found working in dangerous surroundings was presumed to have accepted the risk from them. The effect of the decision is to reverse the *onus*. *Thomas* v. *Quartermaine* was a step in that direction: it did not go the whole way, and Bowen L. J.'s judgment in any view remains a landmark in the history of the principle with which it deals.

Mr. Salmond's remarks on servitudes (at p. 226) are ingenious, and open up more matter for discussion than we have space available for. We can only indicate a doubt as to one position he takes up: 'It cannot be the law that a mere trespasser who has been in the habit of crossing another man's land can sue a stranger for an act which obstructs his use of this *de facto* easement.' Surely an interference with me is no less actionable because when interfered with by a 'stranger' I am where, as against some other person, not the stranger nor any one connected with him, I have no right to be. But perhaps Mr. Salmond means only that a so-called inchoate easement does not confer any right known to the law: *Greenhalgh* v. *Brindley* [1901] 2 Ch. 324.

Mr. Salmond's statement (at p. 295) that 'the doctrine of remoteness of damage has no application to the wrong of conversion so long as no damages are claimed beyond the value of the property,' is quite novel to us. If a conversion, a wrongful act, be proved, all the damage in fact following from the wrongful act is recoverable, as in other cases, whether the wrongdoer could, previously to his wrongdoing, have foreseen them or not; but so far as we know there is no special rule in conversion (except in certain anomalous cases with which remoteness has nothing to do, and which would be best treated as not cases of conversion at all). Mr. Salmond's treatment of conversion is the most unsatisfactory portion of his book. He formulates no less than twenty-three rules which, so far as we can see, only serve to complicate and embarrass a doctrine of law fundamentally simple, and the origin of which he has lucidly and well stated.

With Mr. Salmond's remarks on *The Winkfield* (at pp. 319–321) we agree. The result of that decision may be on the balance, and probably is, the most convenient solution available, but it involves the acceptance of the inconveniences, not to say the absurdities, Mr. Salmond indicates; and, in the opinion of the present writer, the judgment in the Court of Appeal failed to grasp the true problem or truly to represent the learning of the Year Books, which it merely reproduces from Mr. Justice Holmes's book 'The Common Law.' Mr. Salmond's views on the class of decisions of which *Holliday* v. *National Telephone Co.* is a type (at p. 275) are worthy of note. He has also a theory on *Heaven* v. *Pender* (at p. 363).

There are one or two trivial mistakes, as *Greening* v. *Wilkinson* (1825) 1 C. P. 625 (at p. 322), and Abbot C. J. (at p. 289), but they are scarcely worthy of notice. On the whole the book is ably and well done, and should be of much service to the student and also to the practitioner who is a bit shaky in his groundwork. T. B.

Peerage Law in England: a practical treatise for Lawyers and Laymen. With an Appendix of Peerage Charters and Letters Patent (in English). By Francis Beaufort Palmer. London: Stevens & Sons, Lim. 1907. La. 8vo. xiv and 314 pp. (12*s.* 6*d.*)

Sir Francis Palmer, who is the leading authority on company law, naturally raises high expectations when he brings out a book on the Peerage. He says, in his Preface, that he 'has sought to show how peerage

law in England now stands, and—so far as material—how it has stood from time to time during the last eight centuries.' The design is excellent, and the subjects of the twenty chapters into which the text is divided are, as might have been anticipated, well chosen. The book would, however, have been of greater value if some of the references had been a little more explicit, and if some disfiguring matter had been omitted.

The Reports from the Lords' Committees touching the dignity of a Peer of the Realm, well known by that title to all students of peerage matters, have been largely used both in the text and in the appendix. They are, however, commonly but not uniformly cited by Sir F. Palmer as the 'Redesdale Committee Reports.' His object is to suggest that the reports were all drawn up by Lord Redesdale, and that they do not possess any higher authority than that of one individual. Whether that is the fact or not, it seems a pity to discard an old mode of reference, and force every reader to find out and remember the meaning of the new reference to 'R. C.' In his chapter, 'What law governs Peerages and where it is to be found,' Sir F. Palmer mentions 'The Reports of the Lords' Committee on the dignity of a Peerage,' which is yet another title. If a short form of reference is wanted, why not Rep. D. P. or D. P. R.?

The author remarks that in some instances the opinions expressed in these reports have not been upheld, and points out other instances in which they may be incorrect. There is thus introduced a considerable amount of controversy, which occupies much space, and deprives the work of the character to which it might, perhaps, otherwise lay claim—that of a concise and useful compendium.

One illustration of the kind of matter which might with advantage have been omitted may suffice. The author gives in his text (p. 112) a translation of a letter or writ from King Edward III to Hugh de Courtenay, Earl of Devon, concerning the earldom of Devon. It begins, 'whereas you petitioned us, and your petition has been laid before us and our Council, that you *have for a long time been proceeded against* for the recovery of £18 6*s.* 8*d.* of yearly fee of the County of Devon.' This should be, 'whereas you, by your petition presented to us, *have long sued* before us and our Council to have again the £18 6*s.* 8*d.*' &c. The Latin (when its abbreviations are extended) is 'cum vos, per petitionem vestram nobis porrectam, coram nobis et concilio nostro diu *fueritis prosecuti* pro rehabendo,' &c. The letter is in answer to a petition of which, as well as of the writ reciting it, a disastrous translation is also printed in the appendix. Sir F. Palmer appears to have trusted to some assistant—possibly some supposed expert in record learning—who did not even know the difference between a deponent and a passive verb.

Much sympathy, however, is due to the lawyer or the classical scholar who has to rely on others for the translation of abbreviated mediaeval documents. It is not easy to see how Sir F. Palmer could have saved himself from error except by mastering the Latin abbreviations and taking the matter entirely into his own hands. It might, perhaps, be thought that the official Calendar of Close Rolls, upon which the King's letter is enrolled, would in this instance have served his purpose, especially as the calendar is said 'to be made so full that in ordinary cases no further information can be obtained from the rolls themselves.' If, however, we turn to the Calendar of Close Rolls of 9 Edward III (p. 466), 'prepared under the superintendence of the Deputy Keeper of the Records,' we gain nothing except an indefinite reference to the '*Foedera*.' We find the letter

to Courtenay very imperfectly calendared, and without anything to show that it is in answer to his petition. In another passage in the same calendar (p. 376) relating to the same matter, we find precisely the same mistake as that made by Sir F. Palmer's assistant. We there read that Hugh de Courtenay 'by his petition brought before the King and his Council *was long prosecuted* to recover £18 6*s*. 8*d*.' The petitioner is thus represented as having been prosecuted by his own petition.

A smattering of palaeography is, by itself, useless for the explanation of the Chancery Rolls, and particularly of the Close Rolls. They cannot be adequately translated or calendared without sound Latin scholarship (including some acquaintance with the usages peculiar to mediaeval Latin), and a knowledge of the law of the period to which they belong. It can only be hoped that, in some remote future, not only the documents printed in their abbreviated form in the Reports touching the dignity of a peer, but also all the rolls from which they are extracts, will be presented in an English version which will neither lead the student astray nor provoke the smile of the scholar.

Sir F. Palmer, evidently having implicit confidence in his translator, has been induced to give great prominence to his appendix. The table of its contents occupies nearly three pages, while the table of contents of the whole text occupies less than one. If it was thought necessary that the Latin documents should be brought in at all, it would have been better to have left them, as Gibbon left the doings of the Empress Theodora, 'veiled in the decent obscurity of a learned language.'

L. O. P.

Themis, Dike und Verwandtes. Ein Beitrag zur Geschichte der Rechtsidee bei den Griechen. Von Rudolf Hirzel. Leipzig: S. Hirzel. 1907. 8vo. vi and 445 pp.

Like the same learned writer's 'Der Eid,' which we reviewed four years ago (L. Q. R. xix. 337), this book shows extraordinary familiarity with the whole range of Greek literature from its earliest monuments down to our own time, and is delightful to a classical scholar by the wealth and variety of its illustrative quotations. Lawyers who can appreciate these will also be interested to find how much farther back many of our common notions go than they are usually traced. We are content, as a rule, to take the commonplaces of Roman law such as we find them in Justinian, or, at any rate, somewhere in the Corpus Iuris. But the great jurists of the Antonine age worked (as we may see in Cicero) on materials which their predecessors under the Republic had derived from Greek philosophers, in some cases even from prae-Socratic speculation. Thus the description of law as 'imperans honesta prohibens contraria' is Ciceronian and Stoic. The doctrine that all men are naturally free is Greek, and much older than the passages of the Digest where it occurs. Plato had already thought of founding the State on an original contract, and of referring every citizen's duty of allegiance to a continuing tacit agreement, just as Locke does. These are some of the links with classical antiquity of which Prof. Hirzel reminds us.

His main purpose is to investigate early Greek ideas of legal and political justice in the history of the terms by which they were expressed: *θέμις*, *δίκη*, *θεσμός* and *νόμος*. A special section is given to the notion of equality as a factor in the Greek conception of the State (*ἰσονομία*, *ἰσότης*). The goddess Themis has for her original attribute not so much justice as

good counsel: the decisions of the king or chief, executive as well as judicial, are supposed to be inspired by divine wisdom, and not the less because inspiration may be conveyed through some human counsellor reputed specially wise, a man such as at a somewhat later stage becomes the 'speaker of the law.' We do not find any notice of Curtius's opinion, adopted by Prof. E. C. Clark of Cambridge, that *θέμιστες* is not an anomalous plural of *θέμις* but a distinct word; but this seems to be a merely philological point. On the whole *θέμις* and its derivatives belong to the time before the notions of legal justice and judgment have become specialized: they cover every kind of government and administration: even the Cyclopes are said *θεμιστεύειν* each in his own family. The leading idea is not of a general rule, but of that which is prescribed or fitting in the circumstances.

When we come to *δίκη* we have the much more definite conception of a judge or daysman giving judgment between litigants, or, in the earliest stage, interposing to stay the hands of combatants. Prof. Hirzel would even like to refer the word to *δικεῖν*—the throwing down of the staff between the fighters, which persisted in a ceremonial form through the Middle Ages —rather than to *δεικνύναι*. We now think of 'critical' judgment as discerning ideas and reasons, but the word *κρίνειν* may well have denoted, in earlier times, the same kind of manual separation. When *δίκη* was deified, it was as the goddess of retributive and reformatory justice in the underworld, and more in literature than in the visible ritual of temple and altar. We doubt whether her penal attributes are so relatively late as Prof. Hirzel thinks; it is certain, at all events, that blood-feuds and blood-fines provided some of the earliest matter for judicial or arbitral decisions. Vengeance begins to come under the rule of law when there is a question to be discussed, and capable of being referred to the judgment of the wise, whether a slain man's kindred ought to accept a composition; when the further question is raised what the composition ought to be, and the parties refer the assessment to an indifferent person, we have not only judgment but judicial discretion. Ultimately *δίκη*, *τὸ δίκαιον*, or *δικαιοσύνη* covered the whole ground of both legal and political justice.

Another contrast, in a more modern order of ideas, is offered by *θεσμός* and *νόμος*. The former word signifies positive ordinance, especially when considered as establishing institutions and constitutional principles; marriage has a particular association with *θεσμός*. The latter means essentially the rule of custom; *θεσμός* may pass into *νόμος*, but only by being effectively and habitually acted upon. As Prof. Clark says, '*νόμος* in the sense of *statute* is late.'

Finally, the endeavours of Greek speculation to bring the uniformity of nature into relation with human ideas of law and order are considered in a separate section. The learned reader will of course not expect to find anything here about the Aristotelian conception of natural justice, from which the whole Roman and mediaeval doctrine of the Law of Nature was developed. Its origin appears to have been purely ethical, and it lies outside the lines of Prof. Hirzel's inquiry. F. P.

The Scope and Interpretation of the Civil Code of Lower Canada. By Frederick Parker Walton. Montreal: Wilson & Lafleur. 1907. 8vo. xix and 159 pp.

The object of this little book is, as the author informs us, first, to explain the scope of the Civil Code of Quebec, and secondly, to give the main rules

implied in its interpretation. Professor Walton may well say that in Quebec it is of peculiar importance to make an analysis of the elements which compose the law. In fact, there can scarcely be anywhere a more complicated situation in matters legal than exists in the province of Quebec.

In the first place, Quebec is an integral part of the Empire, and as such, her constitutional and administrative law 'so far as it depends upon custom is governed upon the rules of law applied in like matters in England, and so far as it has been reduced to statute, has been so reduced in statutes framed on English models. Neither in national nor in local affairs have French governmental institutions been copied, and, in cases in which public law has to be applied, it is not usual to refer to French authorities.' Thus, for example, Quebec knows nothing of *droit administratif*. If an official wrongs a private person he is accountable to the ordinary courts as in England. As a part of the Empire also, Quebec is governed by such imperial statutes as apply to the whole Empire.

In the next place, Quebec is one province only of a federation, and in certain matters her law is to be found in statutes of the Dominion Parliament passed in relation to subjects placed within the exclusive Dominion jurisdiction by the British North America Act. A considerable portion of Professor Walton's book consists of a concise statement of what the branches of law are which thus lie outside the Civil Code of the Province. For purposes of the Canadian student of law, this portion of the book will no doubt have its value. The same subject, it may be added, and in fact the whole law of legislative power within Canada, may be found treated concisely in an article in the second edition of the American and English Encyclopaedia of Law under the caption 'Dominion of Canada.' Professor Walton, however, does not deal expressly with the interesting question as to what law governs Dominion matters in Quebec when and so far as the Dominion Parliament has not legislated on them; although this is really a matter of far-reaching importance. If it is to be said that there is throughout Canada one body of law upon the subjects assigned to the Dominion behind Dominion legislation, it can only be the English common law, and the working out of that theory would lead to a uniformity of law throughout Canada, except as to subjects assigned to the provinces by the British North America Act and dealt with in Quebec under the French law. The competitive theory would be that the effect of the Dominion legislation in any particular province has to be judged, and Dominion subjects undealt with by statute regulated, according to the law of that province, in which case there would be behind the Dominion legislative powers and statutes, in Quebec, the French law, and in the other provinces the English law. The subject has not, we think, been thoroughly discussed by any writer.

In the third place the criminal law of Quebec is of course English, for whether English criminal law should be regarded as having been introduced by the mere fact of conquest or not, it was certainly introduced by the Quebec Act of 1774.

After eliminating constitutional and administrative law, imperial statutes applicable to the province, criminal law and the law contained in the statutes of the Dominion parliament, the residue is the Provincial Law properly so called. Of this the primary source in Quebec is the Civil Code which came into force on August 1st, 1866, and the most important and valuable feature of Mr. Walton's book is the fact that he has grouped together for the first time in a clear and succinct way those principles of interpretation which should be applied to that code.

Speaking concisely, the Code covers the law of persons, and the law of property, and of the acquisition of property, and includes succession, gifts, obligations in general, special contracts, registration, prescription, and the outlines of the law of merchant shipping and of insurance.

Broadly speaking, as Mr. Walton tells us, the Code, excepting Book 4 which deals with commercial law, is a recension of the Code Napoléon, while preserving some peculiarities of the old law of the province, and correcting many obscurities and inaccuracies which the discussions of more than half a century had discovered in the French code. But the situation created in Quebec by the Code was a peculiar one, for whereas the Code Napoléon purported to make a *tabula rasa* of all pre-existing laws of France, abolishing the Customs of the North such as the Custom of Normandy and the Custom of Paris, and overriding the modified Roman law which prevailed in the South, the Quebec Code does not purport to abolish the old law of the province except where its express provisions are contrary to it.

Now the old law of Quebec prior to the Code consisted of the Custom of Paris, the *lois et ordonnances* of France which prior to 1663, the date of the edict which created a Superior Council for Quebec, had modified or supplemented the Custom, and, according to the view of Mr. Walton, those ordinances later than 1663 which had been registered by the Superior Council of Quebec; also the decrees and regulations of the Superior Council of Quebec itself and the ordinances of the governors and intendants of Canada. To this must be added the works of the old French commentators beginning with Dumoulin, and of whom the one of highest authority is Pothier.

Even to-day in Quebec, on a question on which the Code is silent the opinions of the commentators are conclusive when unanimous, as having force of law in the same manner as the text of the *Coutume de Paris* itself. And where, as not unfrequently happens, differences of opinions exist, the courts have adopted the opinion which seems best founded, giving special weight to the views of Pothier.

The Civil Code was prepared by a commission under instructions from the Legislature directing them to follow as far as possible the French codes, and one of Mr. Walton's rules of interpretation tells that if by collating the articles of the Code the interpretation of the article under discussion is still uncertain, the most reliable guide will be the reports of the commissioners. As has been already stated the commissioners largely followed the Code Napoléon, utilizing, however, the many commentaries on that Code of French jurists, and these latter commentaries have great weight before the courts of the province where the texts are identical. So too the decisions of the French courts, especially of the *Cour de Cassation*, are very frequently quoted as authority and gain great consideration.

The position, however, is complicated by the fact that the commissioners who prepared the Quebec Code drew also many provisions from the English law, and we read in one of Mr. Walton's rules that 'when a provision is derived from the French law it is to be interpreted by reference to French authority, and when it is derived from the English law by reference to English authority.' Again, in that most important department of private law which comes under the category of commercial law, and which includes the law of corporations and the mercantile law or law merchant, the codifiers availed themselves freely of English and Scottish as well as of French authorities. 'In this branch of the law,' says our author, 'since the Code as before it our practice has been to refer both to French and English

authorities. In this field our courts have perhaps more experience than those of any other country, in the application of comparative jurisprudence.'

But in Quebec not only is it permitted to refer to the reports of the commissioners who prepared the Code as authority, in a way in which it is not permitted with us to refer to debates in Parliament, and not only have commentaries and textbooks an authority which textbooks with us do not possess, but the matter is further complicated by the different position in which decided cases stand. Rule 9 in Professor Walton's book states that 'when the question is not concluded by reference to other articles of the Code, or to the explanation of the codifiers, the *next best guide* will be the decided cases upon the point.' In a great many Canadian matters it is noticeable in a striking degree that the condition of things is a sort of compromise between the English and the American equivalents, but in Quebec law the position occupied by decided cases may be described as a sort of middle term between the French system on the one hand, and the English on the other. In France it is a fundamental principle that the courts are not bound by previous decisions. The maxim is *non exemplis sed legibus judicandum est.* The weight given to decided cases in France depends in a great measure on whether the court considering them thinks they proceed upon right principles or not. The appellate courts in France do not consider the judgment of the court below and proceed to render the judgment which the lower court should have rendered, but they consider whether the judgment of the court below has involved a wrong application of principles, and, if it has, they quash the judgment of the court below, and the matter goes back to it to be again dealt with. The decision of the highest court in France, the Court of Cassation, is not theoretically binding upon the lower courts, although of course, practically, if the latter do not conform to the views of the Court of Cassation their judgments will be continually set aside and the business remitted to them to be reconsidered. However, so far as the determination of a particular case is concerned, the lower court after the second successful appeal is bound to conform to the decision of the Court of Cassation. The position in Quebec in respect to the matter is thus expressed by Professor Walton: 'Under our system as matter of theory previous decisions are not absolutely binding. But in practice they enjoy greater authority than they do in France, though less than they do in England, and the tendency is toward giving them greater weight than was formerly the case. This is inevitable seeing that the Privy Council and the Supreme Court of Canada, the two highest courts of appeal, act upon the principle that previous decisions are binding. . . This being the position taken up by the Privy Council and the Supreme Court of Canada, it is clear that courts of inferior jurisdiction (in Quebec) will, for the sake of their own dignity, and to secure uniformity of jurisprudence, be inclined to submit to the views held in the courts above. But the position here is still widely different from that in England. It is not possible to formulate precise rules on the subject because there is no settled opinion and the views of individual judges differ a good deal.'

The whole matter has been carefully considered by P. B. Mignault of Montreal, in an article in La Revue Légale (vol. 6, p. 145). Mr. Mignault, however, seems to concede a higher position to judgments of the Privy Council, and a translation of a few sentences from his article may be useful, it being remembered that in France a succession of concordant decisions is spoken of as establishing a 'jurisprudence.' Mr. Mignault thus summarizes the position in Quebec: 'An isolated decision does not con-

stitute and could not constitute a jurisprudence. *Errare humanum est.* Therefore, in spite of the fact that an appellate tribunal—I ought perhaps to make an exception so far as concerns the Privy Council—may have rendered a decision, it is permissible for a tribunal of an inferior degree, it is even its duty when the cited case upsets our jurisprudence, especially when this decided case has only been so decided by a majority of judges, to insist on what it believes the true doctrine, leaving the appellate tribunal to apply itself again to the study of the question, in order to determine, this time in a final way, if it is proper to make the jurisprudence enter upon a new path. But when everybody is wrong, everybody is right. If a judge finds himself confronted by several concordant judgments, forming a long succession of decisions, so as to have the force of a custom, his duty is to bow to it, and to accept a doctrine which has received the assent of the greater part of the authorized interpreters of our law. To resist this jurisprudence would be useless, since his judgment could not fail to be invalid and injurious, for he would expose the parties to the expense of an appeal.' I am absolutely agreed with Judge Langelier, who said in a recent case, 'I have great respect for the decisions of the tribunals, but I have still more respect for the law . . . Argument ought to be reasoned argument, and reasoning does not consist in a list of judicial decisions nor even in a list of authors' names. Let me say once more with Justinian, *non exemplis sed legibus judicandum est.* But with these reservations let me add that if the superior tribunals insist in their interpretation of the law, if there is no hope of their changing their opinion, the unity and fixity of the jurisprudence demands that individual opinions should efface themselves.'

In such a condition of things as this Professor Walton deserves the praise due to a pioneer in the task of bringing order out of something like chaos. From the first there was great uncertainty of interpretation in respect to the Quebec Code; those who were imbued with the modern French law and the modern French writers were inclined to treat the Code as if it had made a clean sweep of the previous law, whilst the older practitioners, whose habits of thought had been formed by interpreting the Custom of Paris with the help of the commentators, were disposed to treat it as if it were simply a literary effort intended to express the existing law. Again, the tendency of those educated in English legal ways of thinking was to interpret the Code like any other statute, and to apply decided cases in the same way as in England. The clouds of doubt which have thus gathered round the question of the proper interpretation of the Code may readily be imagined, and Mr. Walton deserves credit for having grouped together these questions and endeavoured to explain them and to apply the answer which he thinks to be correct. He has covered matter which it is believed has never been put together before, and matter that it is certainly necessary for a young lawyer in Quebec to have a clear conception of. One peculiarity of style we may hope will be corrected in a future edition. We refer to a most peculiar way of splitting up the book into paragraphs of three or four lines, thus giving a disjointed effect to matter which is very closely connected and should be included in one and the same paragraph.

A. H. F. L.

Domaines Respectifs de l'Association et de la Société. Par HENRI HAYEM. Paris: Arthur Rousseau. 1907. 8vo. iii and 448 pp. (8 fr.)

THIS excellent work gives an interesting account of the development and of the present state of the French Law concerning the numerous forms in which joint undertakings for common objects can be carried out. The only form specially defined by the Code Civil, as adapted for enterprises of any sort intended to be carried out for the common benefit of several persons or of a large number of persons, is the form of the 'société.' A 'société' may be 'civil' or 'commercial': if commercial, it may either be an ordinary partnership, or a commandite partnership, or a company (see Code de Commerce, Arts. 18 and 19); but in all cases it must conform to the following definition contained in Arts. 1832 and 1833 of the Code Civil, that is to say: there must be: (*a*) a partnership capital; (*b*) contributions consisting of money, or other property or of active services; (*c*) a mutual agreement as to the application of the partnership capital and of the partners' services for the pecuniary advantage of the partnership and as to the division of the profits among the partners. It will be seen that this leaves out all combinations formed by several persons for any purpose other than pecuniary advantage and even excludes combinations which, though not intending to divide any profits among the members, are formed with the object of gain. All such combinations of a permanent character existing between a number of persons and not coming under the definition of a 'société' were formerly described as 'associations' and, under that name, were to a large extent made subject to government authorization and supervision by Art. 292 of the Penal Code and a number of supplementary enactments referred to in detail by Mr. Hayem, who also describes the inconvenience caused by the uncertainty of the legal character of such associations from the point of view of private law. The statute of 1901, the elucidation of which is one of Mr. Hayem's main objects, was passed with the intention of removing this inconvenience. That statute defines an association as 'an agreement by which two or more persons join together in a permanent manner their intellectual acquirements, or their energies, with an object other than the sharing of profits,' and allows all associations included within that definition to acquire corporate rights, subject to compliance with certain prescribed conditions. A number of associations of a special nature had previously been regulated by separate laws.

Mr. Hayem explains the relation of the general statute to the separate laws, and surveys the numerous controversies which have arisen with reference to the interpretation of the definition quoted above, which does not, if construed literally, include associations in which the members contribute property of any kind for philanthropic, scientific, political, or religious purposes, and which, according to some writers, also seeks to exclude societies formed for any purposes from which the members derive any personal advantage (e. g. co-operative consumers' associations). While giving conclusive reasons for a more liberal and comprehensive construction of the definition, Mr. Hayem shows that, even if such a liberal construction were universally admitted, there would still be a number of permanent joint undertakings which could neither be classed as 'sociétés' nor as 'associations,' and he makes certain proposals intended to meet the difficulties created by this state of things.

The interest of the book is largely increased by a comparison of the French law on the subjects in question with the law of other countries,

which both as regards its arrangements and the matter which it contains deserves the highest commendation. The following passage comparing English and French law shows the author's power to seize characteristic points: 'Nous aimons les textes généraux divisant les matières en larges catégories, et n'émiettant pas, en de multiples dispositions de détail, l'effort du législateur. Nos législateurs cherchent à bâtir des constructions juridiques, où puissent vivre en bonne intelligence, comme en quelque phalanstère idéal, les institutions sociales. Les Anglo-Saxons donnent à chaque type juridique sa petite loi spéciale. C'est une "maison par famille" qui constitue le trait caractéristique de ce système, et cette phrase caractérise aussi les habitudes de vie intime en Angleterre.'

Much interesting information is given on the legal nature of M. Briand's 'associations cultuelles,' on the French law of trade unions and trade combinations generally (including the combinations which are commonly described as 'trusts'), co-operative societies, mutual societies, and other similar associations. Quite apart from the instruction which it conveys, the book will be perused with pleasure by any reader who can appreciate dialectical skill and lucid and elegant forms of expression.

The absence of an alphabetical index is the only fault which we have been able to discover. E. S.

Problems of International Practice and Diplomacy: with special reference to the Hague Conferences and Conventions and other general international agreements. By Sir Thomas Barclay. London: Sweet & Maxwell, Lim. Boston, Mass.: Boston Book Co. 1907. 4to. xix and 383 pp. (21*s.* net.)

We can say with confidence that this is a most valuable repertory of documents and comments, and that only a small part of it is superseded or made subject to material qualification by anything that has been settled at the Hague Conference of 1907. More cannot be usefully said here and now, for an adequate review of Sir Thomas Barclay's work, which is a series of memoranda on a score of distinct subjects prepared some time before the Conference, would involve detailed comparison with the results or want of results which, at the time of writing, are not yet fully accessible in an authentic record. The learned author's point of view is already well known to those of our readers who follow the development of modern international law and practice. He is an optimist, but a reasonable optimist, being conversant with men and affairs as well as with books. Compared with the enthusiasts of universal arbitration and disarmament, he is like a Fabian compared with a militant Social Democrat. Sir Thomas Barclay's labours will certainly do good service for some years to come to many publicists and diplomatists who will acknowledge their obligations to him, and perhaps to more who will not.

Bibliographie du droit international. Par le Marquis de Olivart. Paris: A. Pedone. 1905, 1907. 4to. 2 parts, 711 and (analytical table) xiii pp. (25 fr. each part.)

This is an enlarged recension of a classified catalogue semi-privately issued in 1899 (L. Q. R. xv. 428), and still regarded by the learned author as in progress, for, as a true bibliographer, he knows that finality is impossible. The second fasciculus is a supplement to the first, arranged according to the same analytical scheme, and proceeding in a descending order

of generality from the law of nations in its widest sense, including the philosophy of public law, to the various branches of international law as now understood and its auxiliary learning. No such comprehensive guide to the literature of the subject has yet been produced or, so far as we know, planned. The materials were supplied by the author's own collection, which he offered to present to the Spanish Ministry of Foreign Affairs, and actually placed in its custody for two years, but under conditions intended to secure its proper preservation and maintenance. When it appeared that there was no prospect of the conditions being fulfilled, he reluctantly reclaimed his books, not altogether intact.

The collection is naturally rich in Spanish works, and will doubtless give much new information to historical students of the subject: but a catalogue which includes 'Also sprach Zarathustra' as a work dealing with public law cannot be said to lack comprehensiveness of aim in other tongues. English is apparently the weakest point. The literature of the Monroe Doctrine (not that we consider this really to belong to international law) is certainly much more voluminous than the reader can learn here; Bentham's works appear, by an unlucky misprint, as having been edited by one 'Browning'; and we read of a writer on constitutional history called 'Maucalay.' Indices of authors and subjects are promised for the third and final part. Meanwhile the order of the works enumerated is chronological within each heading, but according to the date of the edition used; we hope the date of the first edition will ultimately be given for all important works.

The slight and mechanical blemishes incident to the printing of a catalogue dealing with works in many languages must not be supposed to detract from the general merit of this most laudable and remarkable performance.

The Relationship of Landlord and Tenant. By Edgar Foa. Fourth Edition. London: Stevens & Haynes. 1907. La. 8vo. clix and 957 pp. (30*s.*)

We are glad to see from the preface that the author recognizes the evil of increasing the size of a book on every fresh edition, but he seems to think that it is impossible to prevent it. We do not think the difficulty is insuperable. Most law books could be cut down without any great difficulty and with much advantage to themselves and their readers. But the process is laborious, and few authors or editors seem inclined to undertake it. The process must, however, be sooner or later undertaken, otherwise the book grows and grows until it becomes unwieldy, and then is superseded by a smaller and more convenient volume. We are not saying that the volume before us is of inordinate length; we are only expressing a hope that so good a book will not become too bulky and share the fate of all unwieldy works. To some extent the increased size of the present volume is due to recent legislation. The new Agricultural Holdings Act and the Small Holdings and Allotments Act could not well be left out. But we should have preferred to see the latter placed in an appendix, and not in an addendum of twenty closely printed pages. So large an addendum is apt to give one a sense of incompleteness.

Turning from form to substance, we have little to complain of and much to commend. We have tested the book in many ways, and it has not been found wanting. In particular we have scrutinized the parts devoted to outgoings and assessments, upon which there have been so many cases lately, and we have found the subject fully and clearly dealt with and

brought well up to date. We also examined the chapter on Assignment, especially those parts of it which deal with covenants running with the land and assignment of reversions, and here again we find a full and lucid treatment of the subject. The recent and important case of *Woodall* v. *Clifton* [1905] 2 Ch. 257 in this connexion is well handled and properly explained.

There is one point, however, upon which this and other textbooks fail to satisfy us, and that is on the question how the costs of a lease are to be borne. It is said (on p. 333) to be the ordinary practice in large towns for the lease to be prepared by the lessor's solicitor at the expense of the lessee. We have never been able to understand why this should be so, nor are we quite sure that, apart from agreement, it ought to be so or is so. If it is merely a practice, then it is not binding apart from contract. If it is the law, then the practice goes for nothing. Is it the law? The first case cited, *Grissell* v. *Robinson*, 3 Bing. N. C. 10, seems to us to be far from conclusive, and the subsequent cases seem merely to restrict the right, assuming that it exists. The question is one of importance and daily occurrence, and ought not to depend upon practice even if it is universal, which it is not.

The book has an excellent table of cases and a good index, though the latter would be greatly improved by being more alphabetical. On the whole we can strongly recommend this latest edition of a work which deals very ably with a subject of undoubted difficulty.

Select Essays in Anglo-American Legal History. By various authors. Compiled and edited by a Committee of the Association of American Law Schools. Vol. I. Boston, Mass.: Little, Brown & Co. 1907. La. 8vo. ix and 847 pp.

THE compilers of these chapters have done their work not only with all due consents had and obtained, but with excellent judgment, and the result is a conspectus of the general development of the Common Law, not so good as an ideal Blackstone with our present knowledge might make it, but better than any one or two or three men are likely to make it for some time to come. Most of the contributors are or were lawyers of repute, or more; Maitland's admirable Rede lecture on English Law and the Renaissance, probably not easy to meet with otherwise in America, is included bodily. But the editors have not confined themselves to the legal profession; they have borrowed a chapter on Henry II's justice from Mrs. J. R. Green, omitting some paragraphs of extra-forensic history. One very good contribution, 'The Five Ages of the Bench and Bar of England,' by Mr. John Maxcy Zane, of the Chicago Bar and the North-western University, is new. Mr. Van Vechten Veeder's 'A century of English Judicature' shows a critical appreciation of modern English judges which, if it were not before our eyes, we should not have thought attainable even by a good lawyer and a diligent reader of the reports without intimate personal knowledge.

Les fondations en Angleterre: étude de droit comparé. Par JEAN ESCARRA. Paris: Arthur Rousseau. 1907. La. 8vo. ix and 422 pp. + 1 leaf. (10 fr.)

IT would be a sufficiently remarkable feat for a French lawyer to have produced an accurate summary of the legal history of charitable gifts in England. But M. Jean Escarra has done more than this, so much that, if we mistake not, English as well as French scholars ought to be thankful for

this book. He has neglected nothing from the earliest Anglo-Norman conveyancing to the current form of a scheme settled by the Charity Commission, which he sets out in an appendix, and he has followed Maitland's example by considering our doctrine of trusts in the light of Continental theories of corporate personality. He has faced the intricacies of the Statute of Uses, and knows how to distinguish the operation of the Thellusson Act from that of the rule against perpetuities, a point on which English writers are sometimes fallible. We very much doubt whether so systematic and adequate a treatise on the whole subject is to be found in English. M. Escarra appears to have mastered the literature both historical and technical with the thoroughness of a good scholar trained in a good school. We could not vouch for the accuracy of all the details without a very minute examination, but we have no reason to doubt the general soundness of the work. A certain number of merely clerical and mechanical errors in proper names and the like, almost inevitable in the passage of English extracts and citations through a French press, do not call for animadversion.

The Merchant Shipping Acts. By ROBERT TEMPERLEY and HUBERT STUART MOORE, assisted by ALFRED BUCKNILL. Second Edition. London: Stevens & Sons, Lim. 1907. La. 8vo. xcvi and 900 pp. (30*s.*)

THIS work when it first appeared in 1895 was concerned exclusively with the great Act of 1894, which practically repealed and re-enacted in a consolidated form all previous legislation relating to Merchant Shipping.

In strictness, therefore, the present book is a second edition of that of 1895 only in so far as the Act of 1894 is dealt with, while it is an original edition in respect of the subsequent legislation. And indeed, although in its character of a second edition it is to be sincerely welcomed, the authors in their preface admit that its appearance in this capacity is mainly due to the necessity felt by them for amending their original work by the addition thereto of Mr. Lloyd-George's important Act of 1906—an Act to amend the Merchant Shipping Acts, 1894–1900. (Three Acts of minor importance had been passed in 1897, 1898, and 1900.)

The book is a monument of industry, careful comparison, and exact knowledge, and nothing has been spared to make the Acts intelligible to all willing to understand them, but to many of whom, perhaps, opportunity for prolonged study is denied.

The notes appended to the successive sections of the Act of 1906 are naturally without citation of cases decided under them; but they contain, where applicable, careful reference to cases previously decided, as also to sections of the principal Act (1894) which have any bearing on their interpretation.

The labour of this must have been very considerable, but the convenience of it to the student can scarcely be overestimated.

The notes to the Act of 1894 have been enlarged and brought up to date by reference to, and short explanations of, a large number of cases decided since the first edition appeared, and leave little, if anything, to be desired. Those on the sections dealing with Wreck and Salvage, and Limitation of Liability, are especially well arranged and exhaustive. The table comparing the sections of previous Acts with those of the Act of 1894 repealing them, which appeared in the first edition, is reproduced in the present one; by which means the modification of law effected by the repealing Act can

be readily identified. This useful book should continue to be, what its first edition has made it, a necessity to that large section of the community, the success of whose occupations in great measure depends on a practical acquaintance with the operation of these important legislative enactments.

The Law relating to Freight. By J. E. R. Stephens. London: The Syren and Shipping, Lim., and Sweet & Maxwell, Lim. 1907. 8vo. xxiii and 222 pp. (*7s. 6d.*)

This is the second of a series of handbooks on Shipping Law, in course of being issued by the Syren and Shipping, Lim., the first of which, The Law of Demurrage, by the same author, appeared in April of last year, and was noticed in the next succeeding number of this Review. Mr. Stephens has again opened with a chapter entitled Definitions, which, though perhaps not the most important of the total number of seven, comprises rather more than one-fourth of the entire book. Yet it is not too long, for it is only by establishing the true significance of technical commercial terms and figures of speech, that a treatise of this nature can be understood.

In this chapter the author gives—*inter alia*—by reference to decided cases, a short and accurate illustration of the principles of law controlling the payment of freight advance, and shows how this principle may be modified by express stipulation in a contract of affreightment. This is frequently a source of difficulty.

An explanation is also to be found of the meaning of 'dead freight,' a commercial expression not always understood, even by shipowners or their underwriters.

But where did Mr. Stephens find the expression 'back freight'? It is at least not general.

There are few principles of common law more widely known than that, prima facie, freight at risk is not payable to the shipowner, before he is ready to deliver the cargo at its destination. Yet disputes as to when freight has in fact become due are of constant recurrence, and frequently engage the attention of the courts. The author has devoted his longest chapter to the consideration of this question, and by a careful and judicious marshalling of cases has done something towards elucidating underlying principles, and enabling men of business to think out these problems for themselves. The method of payment of freight by bills is shortly and simply dealt with, and Mr. Stephens has done well to accentuate the distinction between freight as an incident of ownership of a vessel, and the rights in respect of it of the assignee of a contract of affreightment. This latter point is not always properly appreciated by commercial men, and may easily become a source of misunderstanding.

The final chapter explains in a practical manner the operation of a shipowner's lien on the cargo—his most effective weapon—for the purpose of enforcing payment of freight.

The book is sufficiently indexed, and its pages, though not bearing the number of the chapter which is a defect—are headed with their subject-matter. This, with the marginal notes, facilitates reference—the very essence of a good textbook. It ought to become a popular treatise.

The Law relating to Covenants in Restraint of Trade. Second Edition. By Joseph Bridges Matthews and Herbert M. Adler. London: Sweet & Maxwell, Lim. 1907. 8vo. x and 231 pp. (*7s. 6d.*)

This book deals with a chapter in the law of contracts, and is of a less ambitious character than its title would lead some people to expect, as there is excluded from its purview the law relating to combinations of traders to prevent competition, and the law relating to combinations of workmen. The latter have been to a large extent legalized, but the former are untouched by legislation. So far as we can see, however, we have to reach p. 184 to learn, from a note to *Collins* v. *Locke* (1879) 4 App. Cas. 674, as abridged in the digest of cases, that the law relating to these combinations of traders is not within the scope of the work. We must, of course, admit the right of every author to set the limits within which he will keep his book, and with this right the reviewer has generally no concern. At every turn we meet with the impress of Mr. Matthews's care and accuracy, which are well known to those who have had occasion to consult his works, and we can only regret that he has not extended the scope of the book. Mr. Adler, as co-editor, must also be congratulated for his share in the preparation of this edition for the press. In Tables A and B, printed in the appendix, the practitioner working at high pressure will find much useful information, but the utility would have been increased if the references to the reports had been more carefully checked.

The Law of Married Women's Contracts. By M. R. Emanuel. London: Butterworth & Co. 1907. Sm. 8vo. xvii and 185 pp.

Mr. Emanuel has prepared a book of considerable utility, and one covering practically the whole ground suggested by the title. The only criticism that occurs to us is that the learned author has not appreciated the full effect of the reading of section 19 of the Married Women's Property Act, 1882, which commended itself to the Court of Appeal in *Hancock* v. *Hancock* (1888) 38 Ch. D. 78, and was applied in *Stevens* v. *Trevor Garrick* [1893] 2 Ch. 307, and *Buckland* v. *Buckland* [1900] 2 Ch. 524. The effect of these decisions has been modified by the Married Women's Property Act of this year (7 Ed. VII, c. 18, s. 2). We are disposed to ascribe the omission of this statute to the fact that the King's printer's copy was not published when the manuscript left the author's hands, so full and accurate have we found the book as a general rule. The equity cases decided prior to the amendment of the general law are dismissed in what some may consider a cursory manner at p. 112. But it is difficult to imagine that a case, where a married woman has contracted a debt a quarter of a century ago, is likely to give rise to questions affecting the extent of her liability; and the title which the author has chosen may be assumed, in a book emanating from the Temple, to signify that proprietary dealings by way of contract, conveyance, or mortgage are intentionally omitted.

The Law of Meetings. By GEORGE A. BLACKWELL. Fourth Edition. London: Butterworth & Co. 1907. Sm. 8vo. xvi, 197 and 22 pp. (*2s. 6d.* net.)

A Handbook of Public Meetings. By GEORGE F. CHAMBERS. Third Edition. Sm. 8vo. London: Stevens & Sons, Lim. xii and 156 pp. (*2s. 6d.* net.)

WE have before us new editions of these two handbooks on public meetings. The scope of the two books is nearly the same. They both contain a good deal of practical advice on the convening and holding of public meetings, the conduct of the chairman, hints to speakers, and information as to the best procedure. Mr. Chambers makes this feature the more prominent part of his book. There is only one short chapter on 'Legal points connected with meetings,' and in that chapter he does not attempt to state the law in any detail, but refers to well-known textbooks where it may be found. There is also an appendix containing some of the statutory regulations governing various kinds of meetings and a digest of cases, which seems fairly complete; but we cannot but think that a statement of the law to be deduced from them would be more useful to the readers for whose use the book is intended.

Mr. Blackwell's book partakes more of the nature of a legal treatise. He tells us nothing of unlawful assemblies, or of the so-called right of public meeting, but treats shortly of the law of defamation as affecting speakers and reporters, and of the rights of the conveners to eject unwelcome persons and control proceedings. A large part of the book consists of extracts from statutes regulating the holding of the meetings of statutory bodies. These extracts do not seem to be well chosen. In some instances they comprise provisions relating to the constitution or powers of the bodies, whilst in other cases the corresponding provisions are omitted. For instance, the powers of Parish Meetings in small parishes as enacted in section 19 of the Local Government Act, 1894, are set out, but we can find no reference to the corresponding powers of Parish or District Councils. The constitution of Education Committees is set forth, but not that of County or Borough Councils.

On the other hand, much matter relating strictly to meetings is omitted. We cannot find the Rules as to Committees of District Councils (Sched. I of Local Government Act, 1894), or the Orders and Circulars of the Local Government Board relating to Parish Meetings and Polls, or the sections of the Local Government Act, 1894, which regulate the right to attend Parish Meetings, or that which prohibits Councillors from voting in matters in which they are interested (Local Government Act, 1894, s. 46). The Standing Orders of the London County Council are printed and will doubtless be found useful as precedents for other bodies.

The Law relating to Riots and Unlawful Assemblies. By the late EDWARD WISE. Fourth Edition. By A. H. BODKIN and LEONARD W. KERSHAW. London: Butterworth & Co., and Shaw & Sons. 1907. Sm. 8vo. xix, 234 and 17 pp.

HAPPILY the Courts have not been called on to deal with many points in the law of riots and unlawful assemblies since the publication of the third edition of Wise on Riots in 1890. But the editors have availed themselves of what little new matter is to be found in the books.

The very recent case of *Field* v. *Receiver of Metropolitan Police* [1907] 2 K. B. 853, came too late for inclusion except in a note. The judgment of Phillimore and Bray JJ. is a valuable contribution to the learning on what are the necessary constituents of a riot. The Featherstone Riots were not the subject of judicial investigation, but they were reported on by a Committee of Inquiry presided over by the late Lord Bowen. This report is quoted from at length and is no doubt properly treated as being of high authority, though not strictly judicial.

The Trades Disputes Acts, 1906, is not directly connected with the law of riots and unlawful assemblies, but the editors have wisely included it, together with references to the recent decisions on the Conspiracy Act, 1875, and on trades disputes.

We regret that the editors have not seen their way to deal more fully with the rights of the Crown and the military in time of rebellion.

They state generally that when armed and forcible resistance to authority becomes general, the crime amounts to levying war against the Crown, and 'a state of war resulting, actual warfare and the law of war come into operation, authorizing indiscriminate attacks upon the enemy and the summary trial and punishment of such as may be taken prisoners'; and speaking of the Newport riots, they say the military might have attacked the armed force led by Frost, 'the attack upon Newport being part of a treasonable outbreak and amounting to the levying of war against the Crown, and therefore justifying *measures of war* against the insurgents.'

This appears to be too wide a statement. Taking the prerogative of employing martial law at its largest, and assuming that no proclamation is necessary, it is too much to say that a state of rebellion justifies the military in taking measures of war, i. e. in treating the insurgents as alien enemies. The military in time of rebellion are justified in doing all that is necessary to restore order, provided they act in good faith and not wantonly, but we know of no authority which goes so far as to say they may take 'measures of war' (see the authorities discussed by several learned writers in L. Q. R. xviii. 117 et seq.). 'Martial law' is an unfortunate expression at best, though inveterate; and 'the law of war' does not seem a happy amendment.

It is very doubtful whether in the case of the Gordon and Newport riots the disturbances amounted to 'a state of actual warfare' (see *Ex parte Marais* [1902] A. C. 109), nor does it appear necessary so to find in order to justify the indiscriminate attacks upon the insurgents even when they were not actually engaged upon felonious outrages on property. It is sufficient justification that they were engaged in 'levying war against the Crown, and were committing a continuous act of treason which would justify the military and all good citizens in resorting to the same measures as if they, the insurgents, were actually engaged in attacks on property or persons.'

Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. Eighteenth Edition. By MAURICE POWELL. Two vols. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1907. 8vo. clxxxiii and 1563 pp. (£2 2*s.*)

WHEN a textbook has survived in current use for 80 years, and has gone through 18 editions, little remains for the reviewer to do, except, by an inspection of each successive edition, to discover whether the work

embodies the latest developments of the law with which it deals. In the case of some celebrated textbooks perpetual editing has reduced the originals to ill-digested masses of legal provender; but this is not the case with the present work, perhaps owing to the greater continuity in the succession of editors. The author was responsible for the first four editions, Edward Smirke assisted in the succeeding six, and the present editor has had a hand in seven out of the following eight.

In the present edition, apart from natural accretions, the only substantial changes are the addition of a short article on actions for conspiracy, the absence of which had struck us previously, but which was probably thought not to deserve separate treatment till the giving of several important decisions during the seven years which have elapsed since the seventeenth edition; and the recasting of the article dealing with actions on policies of marine insurance, in consequence of the Marine Insurance Act, 1906. As for errors, we have sought them but have not found them. With the assistance of some addenda, the work seems to be brought fully up to its date, July, 1907, but in the treatment of the Money-Lenders Act, 1900, we miss a series of recent cases, reported in the 'Times' Law Reports and not elsewhere, which seem to have escaped the editor's notice.

The German Civil Code. Translated and annotated, with an historical Introduction and Appendices. By CHUNG HUI WANG, D.C.L. London: Stevens & Sons, Lim. 1907. La. 8vo. xxv and 631 pp. (21*s.*)

IT is a strange fact, and not highly creditable to the learning of English-speaking countries, that the German Civil Code, which has been in force for eight years and in print for about twelve, has at last found its English translator in a Chinese graduate of the Yale School of law. Dr. Chung Hui Wang has also studied in Berlin; his combined mastery of the two languages is such as many Germans and many Englishmen might envy; his translation is not only accurate but written in idiomatic English, which is more than can be said of the versions from foreign codes and other documents usually supplied for the use of our Courts in England; his notes are concise and practical; and he has added references to the principal editions and versions of the Code, and a useful bilingual list of technical terms. Under this last head it is interesting to know that in the German legislator's mouth *müssen* is imperative, but *sollen* only directory. We congratulate the learned translator on a thoroughly good and workmanlike performance.

The Annual Practice, 1908. Two volumes. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. ccxcv and 1019, and xviii and 1032 pp. (exclusive of separately paged index). (25*s.* net.)

The A. B. C. Practice, 1908. By F. A. STRINGER. Sixth Edition. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. xvi and 200 pp. (5*s.* net.)

The Yearly Practice of the Supreme Court, for 1908. Two volumes. London: Butterworth & Co. cclxxxviii, xviii, and 1947 pp. (exclusive of separately paged index). (25*s.* net.)

THERE is no change in the composition of the editorial staff of the Annual Practice. The principal feature of the new volume is the inclusion

therein of the Revenue Practice of the King's Bench Division, which has been prepared by Mr. J. Johnston, of the King's Remembrancer's Office, with the assistance of Mr. H. A. Hance, the chief clerk of that department. The short Act, known as the Solicitors Act, 1906, has been added to the contents of volume ii. The new Rules of the Supreme Court of August, 1907, are to be found in the proper place, and alterations in the practice due to some recent important decisions are also carefully noted.

Mr. P. E. Vizard has again revised the notes relating to Service out of the Jurisdiction. His Honour Judge Bray has again overhauled the subject of Discovery and Inspection, and Dr. Blake Odgers has further revised the notes on the Pleading Orders. Mr. Rowe, Assistant Paymaster-General, has revised the notes on the Supreme Court Funds Rules, and many learned persons, official and otherwise, are thanked for the assistance which has contributed to the result that the Annual Practice, as heretofore, is an excellent and still improving book of practice.

Mr. Stringer has succeeded in keeping down the bulk of his A. B. C. guide to little more than that of the fifth edition. He has added a note on the method of taxation where High Court costs are taxed on the County Court Scale, and there is a new title—'House of Commons: Enforcing Payment of Costs.' Another new title is that of 'Preliminary Act'; and throughout the book there are many additional notes.

The Yearly Practice has been much enlarged and improved. It contains 767 more pages of matter than the immediately preceding edition, and the price is increased by the sum of five shillings. The principal editors are the same as heretofore, but they are now assisted by Mr. R. E. Ross, of the Central Office, and by three Barristers and a Solicitor. Mr. Ross wrote some years ago a most useful little book on the practice relating to firms, corporations, companies, and societies. The Supreme Court Rules are noted by the Assistant Paymaster-General and Mr. H. Sellar of the Pay Office.

The increase in size of the Yearly Practice is not due to 'padding.' The new edition is practically a new work, rearranged, and, as regards the notes, rewritten. This is the result, we are told, of two years' work spent in the collection, examination, and notation of every reported case on the existing practice. The work has been very much improved, not only in its contents, but also in its appearance. As we prophesied in reviewing former editions of the Annual Practice and the Yearly Practice, the competition between the two works has resulted in each becoming better.

The Revised Table A, with Notes and Comments. By PAUL F. SIMONSON. London: Effingham Wilson, and Sweet & Maxwell, Lim. (*3s. 6d.* net.)

As Mr. Simonson states in a rather long preface, it is not surprising that the old form of a Company's Articles of Association, given in the old Table A, should have become entirely obsolete after the lapse of forty-four years. He finds fault with the arrangement of the clauses in the new Table A which was substituted by order of the Board of Trade a little more than a year ago, and says that 'companies of importance will, it is anticipated, continue the hitherto all but universal practice of having their own articles of association framed in all respects to meet their individual requirements, and will thus avoid the great inconvenience of having to refer to two documents (viz. their special articles, which wil

be indispensable to every company of importance, and the revised Table A) for the purpose of ascertaining what are the regulations of the company with reference to any particular matter.' With these observations no one will disagree.

The author sets out the new Table A (the provisions of which, as he justly says, compare most favourably with the original Table A) and gives valuable notes to most of the clauses. These will enable a draftsman to prepare a short set of articles, being the form of document which is generally known as 'Table A with variations.' Company draftsmen hate the sight of instructions to prepare such a document. It is generally wanted in a great hurry at a small fee, and, however carefully drawn, is a source of annoyance to every one connected with its preparation or use. This, however, is not due to any fault of Mr. Simonson, and his book will, at any rate, save those who are called on to 'knock off' a Table A with variations from some trouble and irritation, by pointing out unsuitable parts of the clauses as they come along, in the course of drafting, for amendment or obliteration.

An Introduction to Commercial Law. By FRANK TILLYARD. London: Adam & Charles Black. 1907. Sm. 8vo. xiv and 242 pp.

THE author's 'first object is to explain to the layman who is studying any part of Commercial Law the nature of our English legal system, and some of the more important rules and principles which go to make it up,' and he achieves that object with signal success. We know of no other book as well fitted to provide a layman with those general principles of the common law which are necessary for understanding the particular branches of Commercial Law peculiarly appertaining to his business.

The chapters on 'Cheques' and on 'Bills of Exchange' are particularly good and might be read with profit by many practising lawyers, and by all who profess to teach. We note, however, that Mr. Tillyard takes the view that *Colonial Bank of Australia* v. *Marshall* 'definitely decides' that a customer who so draws a cheque that a forger is able to insert words and figures increasing the amount is not liable to the bank for the loss sustained in paying the increased amount. Mr. Beven has pointed out (L. Q. R. xxiii. 390) that this decision is inconsistent with *Young* v. *Grote*, and it remains to be seen whether it will be followed in England. At any rate it seems to be premature to treat *Young* v. *Grote* as no longer good law.

A Guide to Trust Accounts. By PRETOR W. CHANDLER. London: Butterworth & Co. 1907. La. 8vo. viii and 230 pp.

THIS work has been written on a suggestion of the Law Society to the author that an elementary manual founded on his previous work of 'Accounts of Executors and Trustees' was needed, and might with advantage be provided for the use of students. The book deals with the system of keeping accounts in its simplest form, but it is of course true that the basis of the system is common to both the simplest and most complicated accounts. We do not doubt that the book will serve the purpose for which it was written. It can hardly fail to be an aid to the student, and it perhaps may be found useful in daily practice.

The Code of Civil Procedure, being Act XIV of 1882, incorporating amending enactments, with explanatory notes and commentaries. By DINSHAH FARDUNJI MULLA. Second Edition. Bombay: N. M. Tripathi and Company. 1907. La. 8vo. xii, 584 and cxxii pp. (Rs. 8.)

IN the issue of this REVIEW for January, 1901, we welcomed the publication of the first edition of this work as being the first attempt to explain the Code and to contrast conflicting decisions. At the same time we pointed out the existence of omissions and defects which, in our opinion, materially diminished the value of the book.

With the comparatively unimportant exception that the dates of the decisions are not given, all the defects then pointed out have been removed, and Mr. Mulla has published a work which is calculated to be of considerable help both to practitioners and to students. It is undoubtedly superior to any other existing edition of the Code.

The utility of the book has been considerably increased by the inclusion of copies of the charters of the several High Courts, and of the decisions thereunder, by information as to the jurisdiction of the Civil Courts, and in many other respects. All recent decisions are cited, and the work is not encumbered by obsolete authorities.

The amendment of the Civil Procedure Code has for a long time been in contemplation by the Government of India, and there is now apparently a prospect of the early passing of an enactment differing completely in its form from Act XIV of 1882. In publishing a new edition of the existing Code, Mr. Mulla displays an unbounded confidence in the capacity of the Government of India for procrastination.

We have also received:—

Encyclopaedia of the Laws of England. Second Edition. Vol. VII. Ice to Landlord and Tenant. London: Sweet & Maxwell, Lim. Edinburgh: Wm. Green & Sons. 1907. La. 8vo. viii and 765 pp. (and earlier volumes received in the course of 1907). (21*s.* per vol.)—The editors of this work are doing their best to maintain the high standard attained in the first edition, and will no doubt be stimulated to continued effort in the future by the rivalry of Lord Halsbury's undertaking, noticed among our reviews of books above. In this last volume Sir T. Barclay's article on International Law has been revised and enlarged by Mr. G. H. B. Kenrick: it is inevitable bad luck that the results of the Hague Conference of 1907 could not be definitely stated. The late Mr. Pitt-Lewis's article on the Inns of Court has been posted up in modern details, but a proper list of historical authorities should have been added, or, still better, the whole of the historical part should have been rewritten by a competent scholar.

Company Precedents for use in relation to companies subject to the Companies Acts, 1862 to 1907. Part III, Debentures and Debenture Stock. Tenth Edition. By SIR FRANCIS BEAUFORT PALMER. London: Stevens & Sons, Lim. 1907. La. 8vo. lxviii and 882 pp. (25*s.*)—The tenth edition of a standard work calls for little more than an intimation of its appearance. This edition has been carefully brought up to date. The Preface states that 'Due regard has been paid to intervening decisions and to the important provisions of the Companies Act, 1907, which in many respects has materially improved the law. The Author hopes that the fact that he was a member of the Board of Trade committee on whose report the Bill for the Act of 1907 was framed, has not disqualified him

from interpreting its provisions.' On the contrary, we think the Act could have no better commentator than Sir F. B. Palmer.

Institutes of the Laws of Ceylon. No. 1, The Law of Persons and Things. By K. BALASINGHAM. Jaffna, Ceylon: S. Ragunath & Co. [1906.] 8vo. 189 pp. + preface, index, and appendix separately paged.—This instalment of a more extensive work, sent to us more than a year after publication, gives the doctrine of the Dutch civilians in a concise digest form. The author (judging by the list of books in the appendix) is unacquainted with recent English or other European work on classical Roman law. We do not say that this is necessarily material.

Huur Van Huizen en Landen Volgens het Hedendaagsch Romeinsch-Hollandsch Recht (the contract of *locatio conductio*, so far as relates to houses and land, in modern Roman-Dutch law: a thesis presented for the degree of Doctor in R. D. Law at Leyden). By H. D. J. BODENSTEIN (of Potchefstroom, Transvaal). Leyden. 1907. 8vo. xvi and 183 pp.—The thesis is followed, as usual in Continental universities, by a number of propositions which the candidate offers to maintain. The last of them is that a final Court of Appeal for the whole of South Africa is highly desirable.

Sweet and Maxwell's Diary for Lawyers for 1908. Edited by FRANCIS A. STRINGER and J. JOHNSTON. London: Sweet & Maxwell, Lim. Manchester: Meredith, Ray & Littler. 8vo. 484 pp. + Diary. (3*s.* 6*d.* net.)—The mass of legal information contained in this Diary appears to have been brought quite up to date.

An Epitome of the Law affecting Marine Insurance. By LAURENCE DUCKWORTH. Second Edition. London: Effingham Wilson. 1907. 8vo. xi and 186 pp. (3*s.* 6*d.* net.)—This edition, like its forerunner, is a fearless attempt to embody in a few pages that which others have scarcely succeeded in compressing into large volumes.

But the task is wellnigh impossible; and Mr. Duckworth need not feel abashed or discouraged if men of law and commerce alike, continue to rely on the larger works for the solution of their daily difficulties. There are two appendices setting out (1) the common form of marine insurance policy, and (2) the Marine Insurance Act, 1906, which are not without utility.

The Yorkshire Registries Acts, 1884 *and* 1885, together with Forms and Rules thereunder, and practical notes as to the registration of documents. By CHARLES JOSEPH HAWORTH. London: Stevens & Sons, Lim. 1907. 8vo. 116 and viii pp.—The scope of this little volume is indicated accurately by the title, and, as a mere compilation, it will supply the Yorkshire conveyancing practitioner with a much-needed new edition of the Acts and Rules, &c. But the book cannot be taken seriously as a legal textbook. The author cites cases decided under other registration systems in Ireland, South Africa, and Australia, without having taken the trouble to acquaint himself with the rules of law relating to those systems. There are altogether too many mistakes, both of commission and omission, to allow of the statements in the notes being relied on without careful verification.

The Life in the Law of Sir Henry Hawkins (*Baron Brampton*) *as related by him to the Writer.* London: Wyman & Sons, Lim. 1907. 8vo. 64 pp. (6*d.* net.)—This little book is digested from notes of a series of interviews with the late Lord Brampton, who, having seen the notes, forbade publication in his lifetime, but appears to have given some kind of general licence to publish them after his death. Though many of the anecdotes are

familiar, the future continuators of Foss's 'Judges of England' and the Dictionary of National Biography will have to take account of it. One golden rule for cross-examining counsel may be gathered from Lord Brampton's dicta: 'Never splash about.'

The Law and Custom of the Constitution. By SIR WILLIAM R. ANSON, Bart. Vol. II: The Crown. Part 1. Oxford: Clarendon Press. 1907. La. 8vo. xxxii and 283 pp.—The Warden of All Souls says in the preface to this edition: 'I have added considerably to the chapter on the Councils of the Crown, and have, I hope, been able to throw some fresh light on the beginnings of Cabinet Government at the close of the seventeenth and commencement of the eighteenth centuries.' The publication of Queen Victoria's Letters has given occasion for some fresh paragraphs now added to the Introduction.

Archiv für Rechts- und Wirtschaftsphilosophie, mit besonderer Berücksichtigung der Gesetzgebungsfragen. Herausgegeben von Dr. Iur. JOSEF KOHLER und Dr. Iur. FRITZ BEROLZHEIMER. Berlin u. Leipzig.—The first number of this new review of legal and economical science appeared in October. To most English lawyers a good deal of the contents would seem to belong to theoretical politics rather than to jurisprudence. Prof. Kohler leads off with a vigorous and characteristic introduction.

Die Bücher Moses und Josua: eine Einführung für Laien. Von ADALBERT MERX. ('Religionsgeschichtliche Volksbücher'). Tübingen: J. C. B. Mohr. 1907. 8vo. 160 pp. (M. 1.)—This claims notice as a law-book, for the learned author has summarized the provisions of the Mosaic books, according to their earlier and also their later 'Deuteronomic' recension, in the arrangement familiar to students of modern Continental jurisprudence, or as near thereto as may be. He is strongly of opinion, against some recent commentators, that the internal evidence of a systematic scheme of legislation is conclusive. He also thinks that many of the ceremonial ordinances are in affirmance of very ancient Semitic tribal customs. He does not find any considerable foreign elements imported from Hammurabi's laws or otherwise. The style is lucid and as little technical as the subject-matter admits.

Tebbs' A. B. C. County Court Practice. By HERBERT L. TEBBS. London: Butterworth & Co. 1907. 8vo. xiv and 558 pp. (10*s.* 6*d.* net.)—This is a condensed County Court Practice in a handy form, the matter being arranged conveniently in alphabetical order.

The full text of the County Court Acts and Rules and a Digest of the practice under the Workmen's Compensation Act are given.

A Digest of Cases, overruled, approved, or otherwise dealt with in the English and other Courts, with a selection of extracts from judgments referring to such cases. Founded on Dale and Lehmann's Digest of Cases Overruled. By WILLIAM ANDREW GEORGE WOODS and JOHN RITCHIE. Three Vols. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. La. 8vo. ccxxxii pp. and 5,592 columns. (£5 5*s.*)—Review will follow.

The Annual County Courts Practice, 1908. Edited by His Honour WILLIAM CECIL SMYLY, K.C., and WILLIAM JAMES BROOKS. Two Vols. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 8vo. Vol. I, xxxii, 1,308 and 180 (index) pp. Vol. II, vii, 632 and 180 (index) pp.

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NOTES.

THE Court of Appeal had to decide some very interesting points in *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* [1908] 1 Ch. 335, 77 L. J. Ch. 218. *A*, a manufacturer, sells goods wholesale to *M*, called by trade usage a factor, on the terms (among others) that (*a*) he must not retail them below list prices, and (*b*) must not sell at all to any one who has not signed *A*'s form of retail agreement, or whom, by putting his name on a 'suspended list,' *A* has warned the 'factors' not to supply. (How far this list was accessible to the trade in general, or *A*'s customers, does not seem to have been explained.) The retail agreement in like manner forbids cutting prices and dealing with persons on the suspended list. *Z* is a rival company put by *A* on the suspended list. *P* is a customer of both *A* (through *M*) and *Z*; he does not know that *Z* is 'suspended' by *A*. As a condition precedent to obtaining *A*'s goods from *M* he has signed *A*'s retail agreement. At *Z*'s request he obtains goods of *A*'s make from *M* as for himself, pays for them with *Z*'s money, and hands them over to *Z*, making no profit for himself.

Moreover, *X* and *Y*, being in fact secret agents of *Z*, deal with *A*'s 'factors' in false names as retailers, having signed the retail agreement in false names, and thus obtain *A*'s goods, the factors not knowing their real purpose, for the use of *Z*. Thus *Z* is enabled to compete with *A*, to the injury of *A*'s business, in the sale of other goods for the use of which by the ultimate purchasers *A*'s goods in question are necessary or very convenient.

On these facts what are *A*'s remedies? In respect of *P*'s dealing there is no cause of action against *Z*, and in this all the judges concerned, Joyce J., Lord Alverstone C. J., Buckley L. J. and Kennedy L. J., agreed. Even if *P* had contracted with *A* at all, which on the face of the transaction appeared to be doubtful for want of any consideration moving from *A*, he did not break that contract by buying *A*'s goods through *M* for persons whom he did

not know to be on the 'suspended list'; and therefore *Z* did not procure him to break any contract with *A*, and could not be liable under the doctrine of *Lumley* v. *Gye*. But (per Kennedy L. J. explicitly, and implicitly in the other judgments in C. A.) it is not maintainable since *Quinn* v. *Leathem*, if it ever was, that the application of that doctrine is limited to contracts for personal services or performances, as Joyce J. (somewhat out of date, if we may say so) thought in the Court below. It is now too well settled for argument that a covenant cannot be made to run with goods, and therefore *Z* could not in any case be liable under the agreement itself.

If *P* had been a defendant, which he was not, it might have been more closely considered what was the true construction of the 'retail agreement.' We suspect that the framers of these forms intended to fix both 'factors' and retailers with notice of the names on the 'suspended list,' though, as at present advised, we do not think they succeeded.

As to *X* and *Y*'s dealings, they make *Z*, the concealed principal, liable, in the opinion of the Court of Appeal, who differed with Joyce J. on this part of the case, for wilfully procuring the 'factors' from whom they obtained *A*'s goods to break their duty to *A*. It is really not material whether these 'factors,' who were not before the Court, were or were not excusable on the ground that they acted in good faith on false and fraudulent representations. Buckley L. J. thought, seemingly, there was a breach of their contract with *A*. Kennedy L. J. distinctly thought there was not. We may suggest that, if not, *Z* was estopped from saying so, for the sales to *X* and *Y*, if not actionable breaches of agreement, were prevented from being so wholly by *Z*'s fraudulent device to conceal the fact that *Z*, a person to whom the factors had bound themselves not to sell, was the real buyer. But Kennedy L. J. went further and held that, apart from any question of contractual rights, it is an actionable wrong to injure one's neighbour through acts of an innocent third person procured by one's own wilful deceit of that person; and we are glad he did so, for it is a step towards the adoption of the broad rule of civil duty more than once propounded by Lord Bowen.

There was much talk in this case of 'contractual relation.' We would humbly submit that there is no magic in this rather inelegant term. A 'contractual relation' can only be a relation between parties to a contract, and accordingly such a relation exists wherever there is a contract, and does not exist where there is none. Certainly there are different incidents of different kinds of contract, but talking about 'contractual relation' will not help us to know what they are.

F. P.

Nelson Line (Liverpool), Ltd. v. *James Nelson & Sons, Ltd.* [1908] A. C. 16, 77 L. J. K. B. 82, shows once more that a person who enters into a contract cannot rid himself of his implied initial obligations except by the use of clear and unmistakable language. Ambiguous words, whatever may have been the intention of the parties, cannot be relied upon, and will not be construed by the Court as a release from such obligations. In *Elderslie Steamship Co.* v. *Borthwick* [1905] A. C. at p. 96, where, as in the present case, the Court was asked to construe a contract for the carriage of goods by sea, Lord Macnaghten said that he was unable to reconcile two of the clauses, and that 'in such a case an ambiguous document is no protection. It is a wholesome rule that a shipowner who wishes to escape the liability which might attach to him for sending an unseaworthy vessel to sea must say so in plain words.'

In *West Leigh Colliery Co., Ltd.* v. *Tunnicliffe & Hampson, Ltd.* [1908] A. C. 27, 77 L. J. Ch. 102, the House of Lords has reaffirmed the principle established by *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App. Cas. 127, and *Backhouse* v. *Bonomi* (1861) 9 H. L. C. 503, which was in danger of being weakened by the decision of the Court of Appeal ([1906] 2 Ch. 22, 75 L. J. Ch. 512).

The Court of Appeal there held that the depreciation in the market value of property caused by a subsidence was recoverable as compensation by the owner of the surface, in addition to a sum representing the physical damage actually sustained up to the time of action.

The House of Lords has now disallowed the claim for depreciation, leaving the plaintiffs to bring a fresh action should further damage actually occur. The law in this subject may be a little wanting in elasticity, but it is certainly very difficult to allow a claim for a fear of future subsidence, and then, when it does occur, to ascertain what further sum (if any) should be allowed to complete the compensation. The only way out of the difficulty seems to be to allow a claim to be made once for all as in actions for personal injuries. This might answer where the minerals were exhausted and the working had ceased, but it would hardly do when the working was continuous, and the injury to the surface might be aggravated at any moment by careless or negligent mining operations.

The Court of Appeal had really given damages for which, if they had stood alone, no action could have been brought; and the House of Lords declined to sanction such an exception to the ordinary rules. Anomalies in the logic of the law should be allowed only for grave cause.

Zacklynski v. *Polushie* [1908] A. C. 65, 77 L. J. P. C. 17, is a curious case presenting some analogies to the great case of the Scottish Free Church. A dozen years ago certain Little Russians from Galicia settled in the Canadian North-West Provinces (then territories). In Galicia they had been Uniate Greeks, which means that for purely political reasons they had to profess obedience to the See of Rome and acceptance of all Roman dogmas, retaining however their Slavonic liturgy and customs. In Canada the settlers did not see why they should go on paying dues to the Pope, and put themselves in communication with an Orthodox Greek bishop, who sent them priests and encouragement. But a Roman, apparently French-Canadian, bishop appeared on the scene later, and endeavoured, by lavish promises of assistance in church building, to lead back the flock into his own fold. He was the Roman coadjutor bishop of the diocese. Then, by some contrivance which is not very clear, he obtained a grant of the site from the Land Office in the name of his principal. There is a phrase used more than once in Bracton about 'falcem in alienam segetem immittere.' When the congregation found out what had happened they wholly repudiated the Roman jurisdiction and insisted on the bishop assigning to trustees. But the terms of the written grant remained on record and spoke of a 'Greek Catholic' church. To a Roman canonist this may, for aught we know, mean 'Uniate': but the Judicial Committee held that the words in themselves were ambiguous, and consistent with what the facts made plain, that the people intended to be Orthodox Greek and not Roman Catholics; and they agreed with the Supreme Court of the Dominion, against the Court below, that there was no ground for restraining the trustees of the church from appointing an Orthodox Greek priest. *Et sic dominus Papa in misericordia.* The judgment was delivered by Lord Macnaghten: there is nothing in it contrary to the letter of the Scottish Free Church decision, but somehow the spirit is different, and gives reason to hope that the extremely technical views which prevailed with the majority in that case are not likely to prevail again.

Careful consideration of the full report of *Ogden* v. *Ogden* [1908] P. 46, 77 L. J. P. 34, C. A. suggests the following reflections:

(1) The actual and direct effect of the judgment of the C. A. may be summed up in one sentence: 'The Court approves of and follows *Simonin* v. *Mallac*, 1860, 2 Sw. & Tr. 67.' In truth *Ogden* v. *Ogden* decides nothing whatever which was not determined by *Simonin* v. *Mallac*, and which has not been treated as good law for some forty-seven years. The whole importance of *Ogden* v. *Ogden* lies in the language used by the Court of Appeal in delivering judgment.

(2) The language, though not the decision of the C. A., does not overrule, but lessens the authority of the doctrine laid down by the C. A. in *Sottomayor* v. *De Barros*, 1877, 3 P. D. 1, 5, that 'as in other contracts, so in that of marriage, personal capacity must depend on the law of the domicil.' The Court of Appeal as to-day constituted clearly leans towards the theory that personal capacity, as in other contracts, so in that of marriage, depends, at any rate when the marriage is celebrated in England, on the *lex loci contractus*. The Court thus throws doubt upon the validity of a principle which has been accepted as law for over thirty years, and which lies at the bottom of the decisions given in several most important cases more or less closely connected with the law governing capacity to marry (see *Brook* v. *Brook*, 1861, 9 H. L. C. 193; *Re Cooke's Trusts*, 1887, 56 L. J. Ch. 637; *Cooper* v. *Cooper*, 1888, 13 App. Cas. 88; *Viditz* v. *O'Hagan* [1900] 2 Ch. 87, C. A.; *In re Bozzelli's Settlement* [1902] 1 Ch. 751).

(3) Though the language as to contractual capacity used by the Court which decided *Sottomayor* v. *De Barros* was probably rather too wide, it may be regretted that the Court which decided *Ogden* v. *Ogden* did not consider the question whether there may not be a wide difference between the law which determines the capacity of a person to enter into an ordinary mercantile contract and the law which determines the capacity of a person to enter into the contract of marriage or any contract closely connected with marriage. Reasons suggest themselves why capacity in the one case may be rightly determined by the law of the country where the contract is made (*lex loci contractus*), whilst capacity in the other case may be rightly determined by the law of the country where a party to the marriage contract is domiciled.

(4) In *Ogden* v. *Ogden* the question of divorce jurisdiction did not in strictness call for decision. The Court of Appeal, however, for the benefit of any woman placed, as was the appellant, in the awkward position of being held in England married to a French citizen, whilst her marriage with him was declared a nullity by French Courts, threw out the suggestion that in such circumstances the wife might probably be treated by the English Divorce Court as having a domicil in England sufficient to support proceedings for the dissolution of her marriage. The suggestion is not in itself unreasonable, but it has the bad effect of introducing a new, and, as things now stand, a hypothetical and very uncertain exception to the established rule that divorce jurisdiction is and ought to be based upon domicil (*Le Mesurier* v. *Le Mesurier* [1895] A. C. 517). With Courts, as with Parliaments, hard cases are apt to produce dubious if not bad law. At present the one certain but far from

satisfactory conclusion is that the modern Continental doctrine of preferring nationality to domicil, so logical and simple on the face of it as to have captured most of the legislatures and jurists of Europe, has really led to far more confusion than it prevents.

Devise and bequest to *A* 'provided that he does not enter into the naval or military services of the country,' with gifts over in that event. Such conditions subsequent are void as against public policy, since they tend to deter subjects of the King from performing services which Parliament holds necessary for the defence of the realm: *Re Beard* [1908] 1 Ch. 383, 77 L. J. Ch. 265; and accordingly the gifts are absolute. The decision is clearly right. It is conceived that the like reason would apply to a condition purporting to restrain the donee from serving the Crown in a civil capacity; for good government is quite as needful as defence. *Quaere* as to a condition against entering some particular branch of the service. An 'ambitious testator' (see *Egerton* v. *Brownlow*) might wish to restrain the donee from serving in a non-combatant branch. But the question is not likely to arise.

Two cases on another point of public policy, which perhaps may be of more general interest, have been decided within a very short time. In *Spiers* v. *Hunt* [1908] 1 K. B. 720, 77 L. J. K. B. 321, Phillimore J. decided that a promise by a married man, to a woman who knew he was married, to marry her after his wife's death, being also made for the purpose of inducing the promisee to commit adultery with him, and followed in fact by that result, was void as against morality and public policy. It was sufficient here to hold that the promise was void as being part of an immoral and unlawful transaction. But Phillimore J. was prepared to hold it void even apart from the circumstances of aggravation, and his opinion was confirmed by the Court of Appeal in *Wilson* v. *Carnley* [1908] 1 K. B. 729, where the question was simply whether a promise of marriage by a man known to the promisee to have a wife living is in any case enforceable. As Vaughan Williams L. J. said: 'this is obviously a contract which a husband in his wife's lifetime could not enter into without being disloyal to his wife.' Then, as Farwell L. J. pointed out, with the example of *Spiers* v. *Hunt* before him, it 'is calculated to act as a direct inducement to immorality,' and 'might even lead to crime.' Modern decisions have kept the doctrine of public policy within bounds, but within these bounds have not destroyed its efficacy.

Note, learned reader, Phillimore J.'s ingenious comment in *Spiers*

v. *Hunt* on the ambiguous case of a conditional feoffment cited from the Book of Assizes. As to *Millward* v. *Littlewood*, 5 Ex. 775, 82 R. R. 871, we still think that decision right on the ground of implied warranty (not estoppel) suggested by Parke B.

In *Bottomley* v. *Brougham* [1908] 1 K. B. 584, 77 L. J. K.B. 311, Channell J. has discussed the basis of the doctrine of absolute privilege as applied to defamatory statements made in the course of, or in connexion with, a judicial proceeding. He criticizes adversely the use of the term 'absolute privilege' on the ground that 'privilege means, in the ordinary way, a private right,' and 'there is no private right of a judge, or an advocate, or a witness, to be malicious.' This definition of privilege is of the loosest kind. The original meaning of *privilegium*, as used by Cicero, was a *lex specialis* enacted *ex post facto* to punish or reward an individual for a particular act (*De Legibus*, iii. 19; *Pro Domo*, 17). Again, associations of persons were prohibited under the Roman Empire, but some societies were allowed to exist by virtue of a *lex specialis* (Sohm's *Institutes*, tr. Ledlie, p. 209). It is easy to understand how from this origin the word came to be used in English law to describe the immunity of a particular class of persons from the operation of the ordinary law of the land. Such a use of the word is, in our opinion, not ill chosen. An apt illustration is the privilege of freedom from arrest enjoyed by members of the House of Commons in going to and from Parliament. Similarly the immunity of judges from all proceedings in respect of acts done by them in their judicial capacity is fittingly called a privilege.

The *dicta* of the learned judge, that this doctrine of absolute privilege is founded on the inexpediency of inquiring whether such acts are done maliciously, cannot be said to be either historically or logically sound. He attempts to justify his view by saying that 'that explanation of the doctrine will be found here and there in many of the cases, although it never seems to have been put into the head-note.' In coming to this conclusion the learned judge has confused one of the ill consequences that would follow, if there were no such doctrine, as pointed out in some of the cases, with the reasons for its existence (see *Scott* v. *Stansfield*, L. R. 3 Ex. 220). So long ago as 1608, Lord Coke gave as the reason for the doctrine that 'the king himself is *de iure* to deliver justice to all his subjects, and for this, that he himself cannot do it to all persons, he delegates his power to his judges, who have the custody and guard of the King's oath' (*Floyd* v. *Barker*, 12 Rep. 23). This passage in effect bases the doctrine on the royal prerogative which has resulted in

the constitutional maxim that the king can do no wrong, the association between a judge administering justice and a royal act being so intimate that no distinction can be drawn between them. A similar view was expressed by the whole Court in Penn and Mead's case (*Hamond* v. *Howell*, 2 Mod. 218). This doctrine that the judges are accountable to the king alone has been elaborately stated in a more modern case (*Taaffe* v. *Downes*, 3 Moo. P. C. 36 n.). Holt C. J. extended the principle to all who are judges by law (*Groenvelt* v. *Burwell*, 1 Ld. Raym. 454). The utility of the doctrine has been vindicated by the Courts on repeated occasions on the logical ground that the rule exists for the benefit of the public, as it secures the absolute independence and fearlessness of the judges (see *Fray* v. *Blackburn*, 3 B. & S. at p. 578; *Taaffe* v. *Downes*, supra; *Kemp* v. *Neville*, 10 C. B. N. S. 523; *Seaman* v. *Netherclift*, 1 C. P. D. 540; *Anderson* v. *Gorrie* [1895] 1 Q. B. 668).

Channell J. appears to think that if the Courts would allow malice to be proved, an action would lie against a judge for a defamatory statement made in the exercise of his duty as a judge. There is a *dictum* of Cockburn C. J. to this effect in *Thomas* v. *Churton* (2 B. & S. 475), but that has been expressly overruled by the Court of Appeal in *Anderson* v. *Gorrie* (*supra*) and by implication in *Munster* v. *Lamb* (11 Q. B. D. 608). In *Kemp* v. *Neville* and *Anderson* v. *Gorrie* the findings of the jury amount to a finding of malice, but it was held that the privilege obtained. If any further evidence is needed to show that this doctrine is independent of any such consideration as that discussed by Channell J. it is found in the fact that the doctrine has been held to apply in cases where malice was not in issue, e. g. conspiracy (*Floyd* v. *Barker*), false imprisonment (*Hamond* v. *Howell*; *Kemp* v. *Neville*), and trespass to the person (*Taaffe* v. *Downes*; *Calder* v. *Halket*, 3 Moo. P. C. 28, 50 R. R. 1), whilst the House of Lords laid it down so long ago as 1824 that no distinction can be drawn between language used by a judge on the Bench and any other judicial act (*Miller* v. *Hope*, 2 Shaw App. Cas. (Sc.) 125).

Equity's traditional reputation for hair-splitting is well maintained in *In re Crane, Adams* v. *Crane* [1908] 1 Ch. 379, 77 L. J. Ch. 212. It has long been a settled rule of the Court that when the income of a legacy is given for the maintenance of an infant legatee, the legacy carries interest from the testator's death—the reason of course being that the testator must have meant maintenance to run from his death if the children were not to starve. This would be impossible if the interest were deferred

for a year and no fund therefore available. Now comes a further question. Suppose a legacy given to a widowed daughter-in-law subject to the obligation of maintaining her deceased husband's children while minors and unmarried. Does the rule apply to such a case? Equity, revelling in refinements, says 'No!' The right to maintenance does not make the children objects of the testator's bounty within the rule. So Sir Thomas Plumer thought in *Raven* v. *Waite* (1 Swanst. 553, 559), and Swinfen Eady J. was not prepared to differ, though he might have split another hair by pointing out that in *Raven* v. *Waite* the children's maintenance was merely the motive of the legacy: in *In re Crane* the maintenance was imposed as a legal obligation. The distinction as it stands is, it must be confessed, an artificial one—a distinction between bounty direct and bounty indirect. If the Church has its dead hand, so has the Court, in precedent. But we in England have long ago committed ourselves to the principle that, within limits to be settled by the House of Lords and the Court of Appeal, uncertainty in the law is a worse evil than unreasonableness, and judges of first instance must continue 'falsely true' to the errors—if they are such—of their predecessors. Another question is whether the ingenuity of our equity judges in supplying provisions which testators and settlers have omitted to express has not on the whole done more harm than good. When once a benevolent court has decided that trees include raspberry bushes, people will take the chance of cabbages being included too, and if they are disappointed will blame the court for their own carelessness.

In re Hazeldine's Trusts [1907] 1 Ch. 686, 76 L. J. Ch. 416, noted last October, has been reversed on appeal. It will be remembered that Warrington J. then declined to make an order for the payment out of Court to mortgagors of the proceeds of sale of some mortgaged property, although the mortgagee's claim was statute barred. His lordship held that the mortgagee's claim was obstructed by s. 8 of the Real Property Limitation Act, 1874, upon the ground that the subject matter in dispute was not land but money, a section which bars the remedy only and not the right. His lordship declined to assist the mortgagors except upon the terms of their discharging the mortgage debt. The Court of Appeal has now decided, [1908] 1 Ch. 34, 77 L. J. Ch. 97, that the statute which had application was the Real Property Limitation Act, 1833, s. 34, which extinguishes the right as well as the remedy. That being so the Court considered that there being no debt they had no power to order anything to be paid to the mortgagees, and directed that the money should be paid out to the mortgagors. *In re Lloyd* [1903] 1 Ch. 385, a case

in which there was a mortgage debt in existence, though the right to recover it by action was statute barred, was considered and distinguished. In cases where there is no debt or claim which possesses legal existence, the equitable doctrine 'he who seeks equity must first do equity' is not pressed upon suitors seeking the assistance of Courts of equity.

A general trust in a will to apply property for emigration purposes is not a 'charitable' use, per Swinfen Eady J. in *In re Sidney, Hingeston* v. *Sidney* [1908] 1 Ch. 128, 77 L. J. Ch. 51. It was argued on behalf of the Attorney-General that emigration was a charitable use, upon the following grounds:—(1) it was intended to assist needy persons to emigrate, (2) it would relieve the pressure at home, and would thereby be beneficial to the community as a whole, (3) even if emigration uses are not necessarily all charitable they are sufficiently definite and ascertainable to enable the Court to apportion the fund between those that are charitable and those that are not. His lordship stated that he saw no reason to restrict the assistance to needy persons, neither could he see that emigration was primarily for the benefit of the public at large. He also pointed out that there was nothing to restrict the gift to emigration to the British Colonies. At one time it would have been argued that a bequest to encourage emigration, so far from being charitable, was against public policy as tending to deprive the King of his subjects at home. The result seems to be that a gift for the purposes of emigration should expressly state that the fund is to be applied to the assistance of the needy, and that either a general or specific gift may be good so long as it satisfies this condition.

In *De Moleyn's & Harris's Contract* [1908] 1 Ch. 110, 77 L. J. Ch. 9, Joyce J. held that a quasi-committee of a lunatic's estate, appointed under s. 116 of the Lunacy Act, 1890, cannot consent, on behalf of a lunatic tenant for life of settled estates, to a sale by trustees, where the latter are selling under s. 56 of the Settled Land Act, 1882. *In re Baggs* [1894] 2 Ch. 416, has already decided that the quasi-committee had not power to sell on behalf of a lunatic tenant for life, and it now appears that neither can he consent to a sale. Had the consent been necessarily exercisable either 'as a check upon the undue exercise of the power' or 'in the character of a trustee' it might have been given under s. 116 of the Lunacy Act, 1890. Joyce J. pointed out that there was no obligation to consent at all, which consideration gave it an independent and co-operative rather than a fiduciary character. The case of consenting to the exercise

of a power of appointment, or the raising of portions, or of sums for advancement purposes, might be regarded as consents coming within s. 116, and to which the quasi-committee of a lunatic not so found would consent.

In re Dickin & Kelsall's Contract [1908] 1 Ch. 218, 77 L. J. Ch. 177, decides a point of some practical importance in the working of the Settled Land Acts.

A tenant for life who has mortgaged his life interest does not, when selling the settled property under the powers of the Acts, require the concurrence of his mortgagee in the conveyance.

Sect. 20, subs. 2 (ii) of the Act of 1882, which precludes him from conveying certain estates, interests, and charges created for securing money actually raised at the date of the deed, applies only to estates created under the settlement (per Chitty J. in *Cardigan* v. *Curzon-Howe* (1888) 40 Ch. D. 342). The section, therefore, which has to be considered by a purchaser who has contracted to buy from such a tenant for life, is sect. 50 of the same Act, which only makes it necessary for the mortgagee to give his consent to the sale.

A solicitor who has business relations with a client of a financial character, the latter not being separately represented, is liable to have stated accounts with him opened where it appears that here and there improper or incorrect charges have been made, even though such accounts stated go back to the year 1883 (*Cheese* v. *Keen* [1908] 1 Ch. 245, 77 L. J. Ch. 163). The Statute of Limitations is excluded upon the ground that the transactions are such as the solicitor has a personal interest in, and are not like the accounts *In re Hindmarsh*, 1 Dr. & Sm. 129, when the solicitor merely received the money for his client's benefit, and had no personal interest in the matter. Moreover, a solicitor is not merely accountable to his client, but independently accountable to the Court whose officer he is (*Lewis* v. *Morgan*, 3 Anst. 769, 3 Cl. & F. 159, 4 R. R. 860, 16 R. R. 7), which was stated by Neville J. in *Cheese* v. *Keen* to be an additional reason for excluding the operation of the Statute of Limitations.

At present we can merely call attention to Prof. J. B. Ames's most interesting paper on 'The Origin of Uses and Trusts' in the February number of the Harvard Law Review.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE EASEMENT OF LIGHT AND AIR AND ITS LIMITATIONS UNDER ENGLISH LAW.

I.

IT seems strange that, in the year of grace 1907, the law upon so elementary a subject as that of the right to light and air[1] should still be unsettled in a country of great towns such as England. I think, however, that a study of the two recent decisions of the House of Lords in *Colls* v. *The Home and Colonial Stores* [1904] A. C. 179 (hereinafter referred to as '*Colls's* case') and *Jolly* v. *Kine* [1907] A. C. 1, will convince the reader that, notwithstanding those decisions, the law really is still unsettled. It may be useful, therefore, to make an attempt to arrive at some logical solution of the difficulty. This can only be done by a recurrence to first principles, and would seem to be best accomplished by considering (1) what the law would now be if legal principle had been logically worked out by the English Courts; and (2) what the law now is, having regard to the manner in which the subject has in fact been dealt with by the English Courts.

I. As to the first steps in our inquiry there is a comfortable unanimity. All are agreed that the right to light and air is a right incident to the possession of land. It obviously cannot be possessed in gross. Now rights of this kind which are appurtenant to land or houses are of two kinds. Some are annexed to the possession of property, as of common right, by the general common law, or by local common law; such as the custom of a manor. Others do not exist as of common right, and can only be acquired by grant from the owner of the tenement, over which the right is enjoyed, or by prescription, which presupposes such a grant.

Examples of the first class are the right of a riparian proprietor to the undiminished flow of the water of a stream past his tenement, and to the user of it for ordinary purposes of the house or of agriculture: the right to the purity of the air which passes over his tenement, and of the water which percolates through the strata beneath it. These are all rights annexed to the possession of land by the common law. Similar rights so annexed by local law

[1] 'Right to light and air' is, of course, not an accurate legal term, but it is used throughout this article as a compendious phrase for 'the right on the part of the owner of a dominant tenement to prevent the owner of a servient tenement from exercising his common law right of building upon the servient tenement so as to obstruct the access of light and air to the dominant tenement.'

are the rights of the tenants of a manor to pasture, fuel, gravel, or the like within the waste of the manor. As rights of this class may be enjoyed by all persons in possession of land, within a particular district, it is obvious that, unless some limit was put upon the user of them, one landowner might monopolize the whole to the exclusion of the others. Hence the Common Law, when dealing with rights of this class, always annexes a qualification that the enjoyment of them by one shall be reasonable, and subject to the like enjoyment on the part of all the others. For instance, every riparian proprietor has the right to use the water flowing past his property for the ordinary and reasonable purposes of domestic life or agriculture; but that right is subject to similar rights in all the other proprietors on the stream.

In strict law, on the other hand, rights appurtenant to land which are obtained by express grant or prescription stand on a different footing.

The measure of these rights is to be found in the precise terms of the grant, or in the exact nature of the user which is the basis of the prescription; and there is no common law qualification of it.

There is a unanimity of opinion amongst lawyers of the present day that the right to light and air is an easement, and, therefore, a right which can only have its origin either in express grant or prescription [1]. The common law right of a proprietor is to build up to the extreme verge of his own land, without any regard to what buildings there may be on that of his neighbour. Any limitation of this right must result either from an express grant on the part of the servient owner, whose common law right to build is sought to be invaded, or from such user on the part of the dominant owner asserting the right, as would give rise to a legal presumption that the servient owner had granted it.

The case of express grant should give rise to no legal difficulty, as the grant should itself define the right. It is not proposed, therefore, to deal further with rights which have such an origin. But, in ninety-nine cases out of a hundred, at least, the origin of such right is prescriptive; and therefore it becomes necessary to consider rather more fully the nature of the user which gives rise to such right and the extent of the right itself.

First, as to the *kind* of user. It must be, to adopt the old Roman Law phrase, *nec vi nec clam nec precario*; neither forcible, nor surreptitious, nor by leave or licence. The proprietor claiming the right must show by evidence that he has exercised it, during the qualifying period, openly, notoriously, and under such circumstances that the adjoining owner must or ought to have known the nature

[1] See the judgments in *Colls's* case, *passim*.

and extent of the user; so that, if he did not interfere to arrest it, the reasonable inference is that he intended to submit to it.

Secondly, as to the *measure* of the right. *It is coterminous with the nature of the user.* If, for instance, a landowner, and those under his control have, during the qualifying period, openly and without interruption, walked to and from the landowner's property across a neighbour's field, in a particular direction, the right resulting is a footpath: if they have ridden over it, it is a bridle path: if they have driven over it, it is a carriage way.

Apply this to the case of light and air. The way in which such right is asserted is by building a house so that the windows thereof in fact obtain their access of light and air from the adjoining land. If this continues openly and without interruption during the qualifying period, the legal inference is that the adjoining owner has agreed to grant such access of light and air *as has been actually enjoyed* by the house in question. That which is asserted by the owner of the house, and that which is submitted to by the owner of the adjoining property, can only be measured by the area and position of the windows in the house of the man claiming the right. The adjoining owner has no means of knowing *as a rule* how the light and air is utilized when it has once passed through the windows.

It would seem therefore that the strict right of a person in possession of a house, who establishes a claim by prescription to the access of light and air to his windows, must be an absolute right to substantially the whole of the light and air which has passed through the windows during the qualifying period, without regard to the manner of its use after it has once passed through, or indeed whether it had been used at all.

Upon one further point there is no question. It is now well settled that the Prescription Act did not in any way alter the nature or extent of the right to light and air, but merely substituted the definite term of twenty years for its acquisition by prescription for the vague period formerly prevailing of immemorial user, or such an user as would lead to the presumption of a lost grant[1].

So much for the nature and extent of the right, *logically considered.*

Assuming the strict legal rights of the dominant owner to be as above stated, what are his remedies?

First, as to the Common Law.

As far back as the case of *Ashby* v. *White* (1703) 2 Lord Raym. 938, it was decided that where a right belonging to one man was

[1] *Colls's* case.

invaded or hindered by another, he whose right was invaded sustained a legal injury for which he was entitled to bring an action on the case, though he had in fact sustained no damage; 'for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right' (per Holt C. J., loc. cit.). This decision has been constantly followed[1], and is now undoubted law. No doubt this principle would be subject to the general modification *de minimis non curat lex*, but it would seem that, in accordance with it, a dominant owner whose right to light had been *sensibly* obstructed by the servient owner would be entitled to bring an action on the case, and recover at all events nominal damages, even though he could prove no damage in fact.

Secondly, as to Chancery.

It was the regular practice in Chancery, up to comparatively recent times, not to interfere by injunction to restrain an invasion of a right until the right, if disputed, had been established by an action at law[2]. When this had been done the Court of Chancery, if called upon to exercise its discretion by granting an injunction to restrain the repetition of the acts complained of, would no doubt take all the circumstances of the case into consideration, including the smallness of the damage, but, *if satisfied that the act complained of was an invasion of a right*, would as a rule grant the injunction, even if the plaintiff had only recovered nominal damages[3].

If, therefore, the nature of the dominant owner's right be as suggested, it would seem to follow, as a logical consequence, that any *sensible* invasion of that right, deliberately committed, would entitle him to recover at all events nominal damages in an action on the case, and probably also to obtain an injunction, where a repetition of the act was threatened, at all events where such invasion was under a claim of right—which, in a case of obstruction of light, it practically always is[4].

II. But, however pleasing the comparative simplicity of the rights and remedies of the dominant owner, as above suggested, might be to the lawyer, it is certain that, in the case of light and air, they do not represent the law of England at the present time.

[1] *Mellor* v. *Spateman* (2 Car. II) 1 Wms. S. 346 (b) note; *Embrey* v. *Owen* (1851) 6 Ex. 353; *Swindon Waterworks Co.* v. *Berks & Wilts Canal* (1875) L. R. 7 H. L. 697.

[2] *Winstanley* v. *Lee* (1818) 2 Swanst. 643; *Elmhirst* v. *Spenser* (1849) 2 M. & G. 18; *Imperial Gas Light & Coke Co.* v. *Broadbent* (1859) 7 H. L. C. 600.

[3] *Rochdale Canal Co.* v. *King* (1851) 2 Sim. N. S. 78 (Lord Cranworth); *Wood* v. *Sutcliffe* (1851) 2 Sim. N. S. 163 (Sir R. Kindersley); *Swindon Waterworks Co.* v. *Berks & Wilts Canal* (1875) L. R. 7 H. L. (per Lord Cairns) at p. 705.

[4] One of the most puzzling points about this confused subject is that this is undoubtedly the law now as regards the right of riparian proprietors to water; and, though that right is of common law and not prescriptive, that could only affect the *quantum* of the right, and not the remedy for its disturbance (see the last case and also *Embrey* v. *Owen* (1851) 6 Ex. 353, where Parke B. deliberately couples the right to water and the right to air in this respect).

Actions for obstruction of light have been common in England for at least 500 years. The earliest reported case on the subject (*Aldred's* case (1611) 9 Rep. 57) quotes authorities culled from the Year Books as far back as 7 Edward 3. The mere existence of the old customs of London and York to rebuild upon old foundations *to any height*, and thereby darken and obscure ancient lights[1], assumes the co-existence of such a thing as a right to light and air—otherwise they would be nonsensical. These customs are referred to in our earliest reports as immemorial customs, and probably are as old as any known to the law. Now, as far as I am aware[2], there was, before the Statute of Westminster the second, no appropriate writ by means of which a man could vindicate a mere right appurtenant to land, where the invasion of it did not amount to a trespass. That statute for the first time gave the necessary elasticity of procedure which produced the 'action on the case.' But until the decision of *Ashby* v. *White* (1703) 2 Lord Raym. 938, it seems to have been generally held that in order to succeed in an action on the case the plaintiff must prove actual damage. 'To maintain an action upon the case, there must be either a real damage, or a possibility of a real damage, and not merely a damage in opinion, or consequence of law' (per Powell J. loc. cit.). Before that decision, therefore, the action on the case was of no avail (according to the then generally received legal opinion) to a dominant owner who desired to prevent an invasion of his right to light, unless he could prove actual damage. Nor was there any other known procedure that he could adopt. Hence it came that, certainly as far back as *Aldred's* case in 1611 (9 Coke's Reports, p. 57), and probably long before, an action for an obstruction of ancient lights was framed not as an action for the infringement of a right, but as an action on the case for a nuisance to land; and limited, as in other actions of nuisance, to cases where actual damage was alleged. In *Aldred's* case it is coupled with a claim for damages for a nuisance from swine. By the time of the decision in *Ashby* v. *White* this procedure had become inveterate. Certainly, from the time of *Aldred's* case downward, it has been laid down over and over again in both Chancery and Common Law Courts that a mere technical infringement of a right to light and air will not give a cause of action, but that the obstruction must be such as to amount to a nuisance.

Thus in *Fishmongers' Company* v. *East India Company* (1752) 1 Dick. 163, Lord Hardwicke says: 'It is not sufficient to say that it

[1] See the custom of London proved in *Plummer* v. *Bentham* (1757) 1 Burr. 248.

[2] I speak under correction as I do not pretend to an elaborate knowledge of such matters.

will alter the plaintiff's lights, for then no piece of vacant ground could be built upon in the City . . . the law says it must be so near as to be a nuisance.'

So in *Back* v. *Stacey* (1826) 2 C. & P. 465, Best C.J., in charging the jury, said:—

'It was not sufficient to constitute an illegal obstruction, that the plaintiff had, in fact, less light than before: nor that his warehouse, the part of his house principally affected, could not be used for all the purposes to which it might otherwise have been applied. In order to give a right of action, there must be a substantial privation of light, sufficient to render the occupation of the house uncomfortable, and to prevent the plaintiff from carrying on his accustomed business (that of a grocer) on the premises as beneficially as he had formerly done.'

In *Parker* v. *Smith* (1832) 5 C. & P. 438, Tindal C.J., in summing up, said:—

'The question in this case is, whether the plaintiff has the same enjoyment now, which he used to have before, of light and air, in the occupation of his house. . . . It is not every possible, every speculative exclusion of light which is the ground of an action; but that which the law recognizes is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business.'

In *Wells* v. *Ody* (1836) 7 C. & P. 410, Parke B. said:—

'The great question is whether the raising of the wall constitutes a nuisance to the plaintiff's premises. With respect to that question, I entirely adopt the law as laid down by the Lord Chief Justice of the Common Pleas, in the case of *Parker* v. *Smith*. A man can bring no action for the loss of a lookout or a prospect; but he may do so if the light and air which would come to his windows are diminished, so as sensibly to diminish the value of his premises for occupation: but the action is not maintainable, as the Lord Chief Justice says, "unless there is such a diminution of light as really makes the premises to a sensible degree less fit for the purposes of business."'

It is therefore clear that, at the present time, whatever the strict legal rights may be, an action for the obstruction of light and air must be treated as if it were an action for nuisance to land, and with the like consequences.

The extent of injury which gives rise to an action for a nuisance to land is best dealt with in the case of *St. Helen's Smelting Company* v. *Tipping* (1865) 11 H. L. C. 642.

The law is there well summarized by Lord Wensleydale in these words:—

'Everything must be looked at from a reasonable point of view

therefore: the law does not regard trifling and small inconveniences, but only regards sensible inconveniences; injuries which sensibly diminish the comfort and enjoyment or value of the property which is affected.'

To this must be added the further qualification as laid down in the same case by Mellor J. in his charge:—

'That the jury ought to take into consideration all the circumstances of the case, including those of time and locality.'

It is important at this point to observe that although all these great judges have laid down that an obstruction, to be actionable, must be such as substantially diminishes the comfort, enjoyment, or value of the premises affected, that diminution is evidently to be measured with reference to the volume of light and air which the plaintiff enjoyed before the obstruction was erected; and has no reference to some hypothetical amount of light and air calculated by any supposed standard of ordinary occupancy. The word 'diminution' implies a diminution from a standard; and the only standard that it is possible to apply is that volume of light and air the right to which plaintiff has asserted by user and the defendant has submitted to [1].

To summarize the result of the discussion up to the present point: The strict right of a dominant owner is to, substantially, that amount of light and air which has hitherto entered by his windows. He cannot, however, claim the aid of the law in so limiting the servient owner's right to build upon his own land as to prevent him from obstructing, however little, the volume of light and air passing through the dominant windows. That such obstruction to be actionable must amount to a nuisance; or, in other words, must be a substantial diminution of the comfort, enjoyment, or value of the premises, for business or occupation, from what they were before the obstruction was erected. That, as in the case of other nuisances, the circumstances of time and locality must be taken into consideration; and a man cannot expect to enjoy the same amount of light in the heart of the City of London as he could reasonably demand in the centre of Salisbury Plain. As it is quaintly urged in *Aldred's* case, *lex non favet delicatorum votis.*

The common law right of action of the dominant owner being thus limited, the equitable jurisdiction is similarly limited. The Court of Chancery never professed to do more than provide a more adequate remedy than an action for damages, in a case where the common law right was proved or admitted. In cases in

[1] In *Parker* v. *Smith*, Tindal C. J. (probably the most accurate of our common lawyers) expressly says: 'The question is whether the plaintiff has the same enjoyment now, *which he used to have before*, of light and air, in the occupation of his house.'

which it is satisfied that a proposed building will create such an obstruction of ancient lights as would be actionable at common law, the Court of Chancery steps in, *before such building is erected*, and says that it shall not be erected:—

'The defendant shall not put it upon the plaintiff to bring an action for damages when we can prevent the wrong being done in the first instance[1].'

In rare cases the Court will interfere *after* a building has been erected and cause it to be pulled down. This, however, is practically only done in two cases, viz., where the defendant has not acted honestly in the matter; as by running up the building surreptitiously, or in breach of an undertaking or an order of the Court; or, secondly, as it is expressed in some cases, where the erection of the building practically amounts to an eviction of the plaintiff.

So far the question under discussion is fairly free from difficulties, and it would hardly be disputed that for many years, up to 1900, actions for the obstruction of light and air were generally dealt with by both Common Law and Chancery Courts upon the footing of the principles above enunciated. In the year 1900, however, the late Mr. Justice Wright in the case of *Warren & Brown* ([1900] 2 Q. B. 722) raised for the first time, in a concrete form, an entirely new question. The exact point that is decided is by no means clear from the report of the case in the Court of First Instance; but it is distinctly stated in the judgment of the Court of Appeal ([1902] 1 K. B., at p. 20):—

'In this case Wright J. has found that certain of the plaintiffs' ancient lights have been substantially interfered with by the defendant's new building. He has also found that the plaintiffs have in fact thereby suffered substantial damage, for he assesses their losses, as to the tenant at £100 and as to the reversioners at £200. On these findings one would have expected judgment entered for the plaintiffs; but the learned judge has made an additional finding, and by reason of that he has dismissed the action. This finding is to the effect that, notwithstanding the substantial diminution of the ancient lights caused by the defendant's new building, abundant light remains for all ordinary purposes of inhabitancy or business. We felt some doubt at first as to what this additional finding meant, and whether it was not contradictory to the other findings: but after further consideration of the judgment, and *after consulting Wright J.*, we have no doubt as to the meaning of the additional finding. It means that, though the light coming from certain of the ancient lights has been substantially diminished, and though the rooms thereby lighted have been so darkened that both the tenants and reversioners have suffered

[1] *Aynsley* v. *Glover* (1874) L. R. 18 Eq. (per Jessel M.R.), at p. 551, &c.

substantial damage, yet the darkened house is still as useful for purposes of habitation or business as what we may term the average run of houses. In other words, the learned judge appears to think that, as a matter of law, there is a sort of standard in the matter of light, and that, if a particular house is by its ancient lights extremely well lighted, those lights may with impunity be substantially interfered with so long as the house in its darkened condition does not fall below the standard.'

This decision of Wright J., purported to be founded upon words used by James L. J. in *Kelk* v. *Pearson* (1871) L. R. 6 Ch. 809, and approved in the subsequent cases of the *City of London Brewery Company* v. *Tennant* (1874) L. R. 9 Ch. 212 and *Ecclesiastical Commissioners* v. *Kino* (1880) 14 Ch. D. 213.

Kelk v. *Pearson* was an action for the obstruction of ancient lights, and it is worth noticing that the main argument for the plaintiff was that, as he had enjoyed free light and air for more than twenty years, he had then, under the Prescription Act (2 & 3 William IV, c. 71, ss. 3 and 7), an absolute right to the whole of the light and air that came through his windows. The words of James L. J., which are made use of to establish the proposition laid down by Wright J. in *Warren* v. *Brown*, are used to combat this contention of the plaintiff. He says (at p. 811):—

'On the part of the plaintiff it was argued before us that this was an absolute right—that now, under the statute 2 & 3 William IV, c. 71, he had an absolute and indefeasible right by way of property to the whole amount of light and air which came through the windows into his house; and that he could maintain an action at law or a suit in equity upon that absolute legal right; and the only question as to the effect or extent of his right would be with regard to the discretion of this Court in considering whether it was a case for damages, or to be interfered with by way of injunction.

'Now I am of opinion that the statute has in no degree whatever altered the pre-existing law as to the nature and extent of this right. The nature and extent of the right before that statute was to have the amount of light through the windows of a house which was sufficient, according to the ordinary notions of mankind, for the comfortable use and enjoyment of that house as a dwelling house, if it were a dwelling house, or for the beneficial use and occupation of the house, if it were a warehouse, shop, or other place of business. That was the extent of the easement—a right to prevent your neighbour from building upon his land so as to obstruct the access of sufficient light and air, to such an extent as to render the house substantially less comfortable and enjoyable. . . . That being the law we have to apply it to this case. The plaintiff says, "I have a house which did enjoy a considerable amount of light to several of the rooms before the defendants

erected this building. That light is now substantially and materially diminished and affected, so as substantially and materially to affect my comfort as an inhabitant of that house."'

He then, upon the evidence, found that that allegation of the plaintiff was proved, and granted him an injunction.

Lord Justice Mellish was of the same opinion, but, before considering what he said, it is material to notice: (1) James L. J. had no intention of laying down any new proposition of law. In *The Ecclesiastical Commissioners* v. *Kino*, 14 Ch. D. at p. 220, he says:—

'What I said in *Kelk* v. *Pearson* and *City of London Brewery Company* v. *Tennant* was only a repetition, with very little variation of language, of what was said by Best C. J. in *Back* v. *Stacey*, which has always been considered as the direction which a judge ought to give to a jury, and which is the direction we ought to give to ourselves.'

(2) He had no intention of laying down any different rule from that enunciated in the same case by Mellish L. J. In *The City of London Brewery Company* v. *Tennant*, L. R. 9 Ch. at p. 216, he says:—

'In the case of *Kelk* v. *Pearson*, the *Lord Justice and myself* endeavoured to express what we thought to be the rule applicable to these cases.'

It becomes important therefore to see what it was that Mellish L. J. did say in *Kelk* v. *Pearson*. It was as follows (at p. 813):—

'Now what the right to light was previously to the statute, and is still at Common Law, I apprehend to be perfectly well established. No doubt it is principally in Nisi Prius cases that we find the rules laid down, but they all substantially agree. The first rule stated by Mr. Gale[1] is that "to maintain an action for obstructing light it is sufficient to show that the easement cannot be enjoyed in so full and ample a manner as before, or that the premises are to a sensible degree less fit for the purposes of business or occupation"; and he cites *Parker* v. *Smith*[2]. That was, I presume, a case where the light was used for purposes of business. When it is used for purposes of residence, I apprehend the rule to be the same. *The question is, whether the house is rendered substantially less fit for the purposes of occupation than it was before.* That is the right at law.

'Now, no doubt, when you come into equity, the cases appear to show that it must be a diminution of a substantial amount of light, so as substantially to make the house less comfortable. *But I cannot think that it is possible for the law to say that there is a certain quantity of light which a man is entitled to, and which is sufficient for him, and that the question is, whether he has been deprived of that quantity of light. It appears to me that it is utterly impossible to make any rule or adopt any measure of that kind. It is essentially a question of com-*

[1] Gale on Easements, 3rd ed., p. 575.

[2] v. s. 5 C. & P. 438.

parison, whether by reason of deprivation of light the house is substantially less comfortable than it was before.

'Much of the evidence of the scientific witnesses was given in support of what I think to be a mistaken view of the law, supposing that there is a certain quantity of light to which a man was entitled and no more[1]; and the witnesses seem to have made comparisons with what would be enough light in London, and to have considered that that was sufficient. But, in my opinion, there is no such rule.'

So far as the judgment of Mellish L.J. is concerned, then, it is clear that he not only lays down the law exactly as it is stated in *Back* v. *Stacey* and the other cases quoted above, but that he goes out of his way to repudiate categorically the doctrine laid down by Wright J. in *Warren* v. *Brown*.

The confusion has arisen from a want of clearness of expression in James L.J. He evidently never intended to say that there was some imaginary standard of ordinary occupancy, which limited the right to light acquired by prescription. He was by a kind of mental inversion treating the right to light as though it were correlative to the remedy for its invasion—an action on the case for a nuisance. In such an action, as was said in *Aldred's* case, *lex non favet delicatorum votis*. You must not be over fastidious. All the circumstances of the case must be looked at, and if an alleged obstruction would not be regarded as a nuisance by a reasonable occupier or trader of the class likely to be found in similar houses in the neighbourhood, it will not become so because it offends some delicate taste or hinders some exceptionally delicate operation. In other words, you cannot in law prevent your neighbour from obstructing every beam of light that penetrates your windows.

Now it does not make much difference whether you say that the plaintiff's right is to prevent the adjoining owner from building so as to create a substantial obstruction to your light; or whether you say that the plaintiff's right is to the amount of light that has in fact been enjoyed, but that the Court will not interfere to protect that right unless it has been substantially invaded—though I think that the latter is the more scientific way of stating the proposition. It does, however, make an enormous difference whether the diminution complained of is to be measured by reference to the amount of light which the plaintiff actually enjoyed before, or by reference to some supposed standard of light which is sufficient for the ordinary individual. In fact, the first part of

[1] It appears from the report (at. p. 809) that the defendants' witnesses deposed that the rooms in the plaintiff's house were low, and naturally badly lighted, all facing to the north; *but that, having the garden open, they had still such an amount of exposed sky area as was seldom seen in the suburbs of London.* The house in question was in Notting Hill. This brings the case very close to *Warren* v. *Brown*.

Sir W. James's statement, if it decided what it is said to have decided, is inconsistent with the latter part and with the rest of his judgment; and it is certainly, if taken literally, in flat contradiction with the law as laid down by Mellish L. J. in the same case.

In further corroboration of the view above suggested as to the real meaning of what James L. J. said in *Kelk* v. *Pearson* it is worth while to recall what Lord Esher said in *Ecclesiastical Commissioners* v. *Kino* (1880) 14 Ch. D. p. 224, in the hearing of James L. J. himself.

He first says that the true rule is that laid down in *Back* v. *Stacey* and *Parker* v. *Smith* and then continues :—

'Then it was said that the law had been altered by the ruling of James L. J. in *Kelk* v. *Pearson*. I confess that his judgment there seems to me to be directly contrary to the proposition for which it is cited [1], for I find he says: "Since the statute, as before the statute, it resolves itself simply into the same question; a question of degree; which would be for a jury, if this were an action at law, to determine, but which it is for us, as judges of fact as well as law, to determine for ourselves as best we may when we are determining it in Chancery," and he lays down the rule in almost the same words as Best C. J. in *Back* v. *Stacey*. Lord Justice Mellish, in the same case, quite as distinctly says that the question is not what may be considered by some persons as sufficient light in London, but that *the question is one of degree and comparison between what the plaintiff had before the defendant's acts and what he has after them, and that there must be a substantial difference.*'

He then adds words which are very weighty in dealing with the present subject (at p. 225):—

'I have ventured to say this, because to my mind the taking some expression of a judge, used in deciding a question of fact, as to his own view of some one fact being material on a particular occasion, as laying down a rule of conduct for other judges in considering a similar state of facts in another case, is a false mode of treating authority.'

It seems pretty clear then that James L. J. was not the real parent of the proposition laid down by Wright J. in *Warren* v. *Brown*. In fact, the Courts continued to administer the law in light and air cases in accordance with the law as laid down in *Back* v. *Stacey* and *Parker* v. *Smith* until *Warren* v. *Brown* was decided. I do not think that it would be disputed by any one familiar with the practice of the Courts that *Warren* v. *Brown* was generally regarded

[1] viz.: that 'If the defendant has left the plaintiff forty-five degrees of light, there is prima facie no injury to the plaintiff, unless he can show something particular in the circumstances of the case.'

as an entirely new departure. The decision of Wright J. in *Warren* v. *Brown* was overruled by the Court of Appeal[1], and so was the decision of Joyce J. in *Colls* v. *The Home and Colonial Stores*[2], which was decided shortly after Wright J.'s decision in *Warren* v. *Brown* and to some extent in deference to its authority.

FRANCIS R. Y. RADCLIFFE.

(To be continued.)

[1] [1902] 1 K. B. 15.

[2] [1902] 1 Ch. 302.

IS THE *RENVOI* A PART OF THE COMMON LAW?

SUPPOSE that *A* dies leaving movables in England, that according to English law his last domicil was French, and that according to French law his last domicil was English. Assuming that England will apply the law of *A*'s domicil at the time of *A*'s death, by what law will England distribute these movables? If the Common Law reject the *renvoi* (a noun coined from the French verb *renvoyer* to describe a doctrine which has excited much controversy in the Civil Law), England will consider irrelevant the French conclusion as to *A*'s domicil and will apply the French Statute of Distributions immediately. If, however, the Common Law include the *renvoi*, England will accept the French conclusion as to *A*'s domicil and permit France to send back the case to English law for farther determination. Or, to put the problem in another fashion, rejection of the *renvoi* implies but one application, acceptance of the *renvoi* two or more applications of the rules of private international law to the distribution of these movables. Which view is supported by principle and authority?

It is generally conceded, by Common Law writers at least, that the law of each country is supreme within its own territory[1]. Hence the law of one country can have no effect, *proprio vigore*, in the territory of another. From this it follows that whatever effect the laws of one country have in another depends solely on the laws of the latter. Examples are numerous both in English and American law. Thus the law of the situs determines the effect upon real estate of transactions, occurring either within or without the country[2]. In the normal case a court cannot get personal jurisdiction of an absentee by publication[3]. Equity, though it has jurisdiction of the parties, will usually refuse to decree the performance of an affirmative act in a foreign jurisdiction[4]. A personal judgment has no force, as such, outside the state where it was rendered, and if action be brought thereon in another state, it lies

[1] Story, Conf. of Laws, sec. 18, 20, 23; 1 Wharton, Conf. of Laws, ch. 1; Dicey, Conf. of Laws, Introduction; *Mahorner* v. *Hooe*, 9 Smedes & Marshall (Mississippi) 247; *Despard* v. *Churchill*, 53 N.Y. 192; *Succession of Petit*, 49 La. An. 625; *Cooper* v. *Beers*, 143 Ill. 25. *Contra*, Westlake, Priv. Int. Law, Introduction.

[2] *Duncan* v. *Lawson*, 41 Ch. D. 394; *Clark* v. *Graham*, 6 Wheat. (U.S.) 577.

[3] *Buchanan* v. *Rucker*, 9 East 192, 9 R. R. 531; *Pennoyer* v. *Neff*, 95 U.S. 714.

[4] *Carteret* v. *Petty*, 2 Swanst. 323; *Watkins* v. *Holman*, 16 Pet. (U. S.) 25.

with the latter to determine whether it will effectuate it or not[1]. A penal statute has no effect extra-territorially[2]. Service of a writ outside the state imposes no duty[3]. Other instances might be given, but these are enough to show the territorial character of law. This, in the last analysis, rests upon power. The enactment of a law-giver is binding within the territory because he can make it good with the strong hand if necessary. It has no inherent force in other countries because one sovereign has not the physical power to act as such in the territory of another.

It is generally settled both in England and America that the law of the situs will regulate the succession to movables according to the law of the country where the owner was domiciled at the time of his death. If he died testate that law governs the validity of his will[4]. If he died intestate it determines how distribution shall be made[5]. Historically the rule seems to have been derived from the maxim *Mobilia sequuntur personam*, though jurists differ as to the mode[6]. Of its practical utility, however, there is no doubt. If the deceased left movables in several countries, and these agree as to his last domicil, the succession thereto is regulated by one law instead of by several. This permits the estate to devolve as a unit instead of in fractions. In practice the court may proceed in either of two ways. Each country may hand over the movables to the country of the domicil, to be dealt with there, or else it may ascertain the law of the domicil and administer it accordingly[7].

Whichever course is adopted the first step is to ascertain the last domicil of the deceased. But domicil is itself a mixed question of law and fact. It may be shortly defined as an inference drawn by law from residence coupled with the appropriate intent[8]. It must therefore be ascertained with reference to some law. This, on principle, should be the law of the situs of the movables. That law is about to effectuate some foreign law which it must now identify. Domicil is the earmark of the foreign law in question. Clearly, then, the law of the situs must lay down the criteria by which this earmark is to be recognized, and determine what facts meet the test which it has just prescribed. Domicil, therefore, is to be ascertained

[1] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670; *Nouvion* v. *Freeman*, 15 App. Cas. 1; *Bischoff* v. *Wethered*, 9 Wall. (U. S.) 812; *Hilton* v. *Guyot*, 159 U. S. 113.

[2] *Com.* v. *Lane*, 113 Mass. 458; *Huntington* v. *Attrill* [1893] A. C. 150; *Huntington* v. *Attrill*, 146 U. S. 657.

[3] *Permanent Building, &c. Co.* v. *Hudson*, 7 Queensland, L. J. 23.

[4] *Enohin* v. *Wylie*, 10 H. L. C. 1; *Talbot* v. *Chamberlain*, 149 Mass. 57; *Dupuy* v. *Wurtz*, 53 N. Y. 556.

[5] *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Wilkins* v. *Ellett*, 108 U. S. 256.

[6] Story, sec. 374–81; Westlake, pp. 177–84.

[7] Dicey, pp. 678, 679.

[8] *Udny* v. *Udny*, 1 H. L. Sc. 441; *Wilbraham* v. *Ludlow*, 99 Mass. 587.

with reference to the law of the situs, and with reference to that law only [1]. In other words, if English law, as the law of the situs, find that the deceased is domiciled in France, it is quite immaterial that France, on the same facts, would find that he is domiciled in England.

When, therefore, the law of the situs has ascertained the last domicil of the deceased, the next step is to ascertain the 'law of the domicil.' With reference to the law of the situs the rules of foreign law are facts, and are proved as such by evidence [2]. The law of the situs will incorporate one or more of these rules. It first, therefore, must determine what foreign rules are applicable to the case at hand, or, to put the matter another way, which of these facts are relevant and material. In other words, the question becomes, what meaning does the law of the situs put upon the term 'law of the domicil'?

The law of any country may be divided into two parts, (*a*) those rules which deal with the creation, nature, and enforcement of rights, which may be termed its 'internal' law, (*b*) those rules which determine what national law is to be applied to the question at issue, which may be termed its 'private international' law [3]. The words 'law of the domicil' do not point definitely to any one of these three. So far as construction goes, they may mean, (1) the 'whole' or territorial law of the domicil, which would include both its 'internal' and its 'private international' law, (2) the 'internal' law of the domicil only, (3) the 'private international' law of the domicil only. But construction is only the first step. Farther analysis shows that there are only two real possibilities. Since the 'internal' law deals directly with rights, and 'private international' law determines what territorial law shall deal with such rights, the application of one excludes the simultaneous application of the other. A concrete case will make this clearer. Suppose, as before, that *A* dies, leaving movables in England, that according to English law he is domiciled in France, but that according to French law his domicil is English. According to English law the law of France is the 'law of the domicil.' If the 'internal' law of France is incorporated the court has only to distribute the movables in accordance therewith, which, of course, passes over the question

[1] *Collier* v. *Rivaz*, 2 Curt. Eccl. 855; *Anderson* v. *Laneuville*, 9 Moo. P. C. 325; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Re Brown-Sequard*, 70 L. T. (N. S.) 811; *Hamilton* v. *Dallas*, L. R. 1 Ch. 257; *Re Martin* [1900] P. 211, per Lindley M. R.; *Harral* v. *Harral*, 39 N. J. Eq. 279; Dicey, 113; 1 Wharton, 157. *Contra*, *Re Johnson* [1903] 1 Ch. 821; *Re Bowes*, 22 T. L. R. 711. See *Dupuy* v. *Wurtz*, 53 N. Y. 556, 570; Westlake, p. 326.

[2] *Bremer* v. *Freeman*, 10 Moo. P. C. 306; *Haven* v. *Foster*, 9 Pick. (Mass.) 112.

[3] Story, sec. 18, 20, 23; 1 Wharton, ch. 1; Dicey, Introduction. But see Westlake, Introduction, and ch. 2.

as to what national law France would apply under the circumstances. If, on the other hand, French 'private international' law be incorporated, that designates English law as the 'law of the domicil,' which, of course, excludes the *direct* application of the French rule of succession. It follows, therefore, that the law of the situs cannot *directly* incorporate the 'whole' law of France, since this includes both French 'internal' and French 'private international law.'

It is not true, of course, that every application of French private international law must of necessity exclude *permanently* an application of French internal law. If French private international law point to French internal law, under the circumstances, the law of the situs might incorporate that as the ultimate rule. This, indeed, is one explanation of what happens in the normal case where both England and France are agreed that the intestate is domiciled in France and the French Statute of Distributions is effectuated by England. But this is not *direct*, but *consequential*, incorporation of French internal law. It takes place directly by virtue of French private international law and remotely by virtue of the law of the situs. Since, therefore, the law of the situs will incorporate the 'law of the domicil,' and since it cannot directly incorporate the whole, the choice must lie between the internal, and the private international, law thereof. In other words, the issue is, will the private international law of the situs effectuate the private international law, or the internal law, of the domicil?

A concrete case will test the question on principle. Suppose, as before, that England is the country of the situs, that according to English law the deceased died domiciled in France, that according to French law he was domiciled in England. Suppose, moreover, that the *renvoi* obtains in each country, that is, that each country incorporates the private international law of the domicil. The result is a square deadlock. England designates French law as the law of the domicil, France immediately designates English law as the law of the domicil. This brings the case to the starting point, and the process may be repeated forever without reaching a rule of succession. Logically there is the same deadlock even in the simplest case where both situs and domicil are English. English private international law is *ex hypothesi* to incorporate the private international law of the domicil only. The domicil is ascertained to be English. The result is that English private international law effectuates English private international law. Again the process may be repeated indefinitely without coming to a conclusion.

It is urged, however, by Mr. Westlake, that when England has determined the domicil to be French, but France has declined to

accept this conclusion, and determined that the domicil is English, France thereby washes its hands of the case, and French law may thereafter be disregarded[1]. This, if sound, would avoid the *circulus inextricabilis* which the *renvoi* seems logically to involve, by stopping it after the first reference back. It is, however, equivalent to making French law, when invoked as the law of the domicil, incorporate English internal law instead of English private international law. The same solution would have to be applied in the reverse case where the movables are situated in France. That would make English law, when invoked as the *law of the domicil*, incorporate French *internal* law. But if the *renvoi* be a part of English law, English law, when invoked as the *law of the situs*, effectuates French *private international* law. It is difficult to see how the name under which English law is invoked can reconcile two rules otherwise squarely opposed. Logically, therefore, this modification seems unsound.

Nor is this all. Both the full-blown *renvoi* and the modified *renvoi* supported by Mr. Westlake are in conflict with the principle of *res judicata*. The law of the situs is supreme. Domicil has been ascertained with reference to that law. This question of domicil, therefore, is *res judicata* as to the case at the bar. Yet if law of the situs effectuate the private international law of the domicil, this question must be immediately reopened and resettled with reference to the latter. It is difficult to see how such a rule can be supported on principle, or in the face of the great weight of authority, which holds that domicil is to be ascertained with reference to the law of the situs only[2].

Principle, then, unless controlled by a hopeless weight of authority, would reject the *renvoi* as a part of the Common Law. This by a process of exclusion points to the internal law of the domicil as the law to be effectuated. To this none of the objections to which the *renvoi* is peculiarly open can be urged. It involves no *circulus inextricabilis* since it involves no national conflict as to domicil. For the same reason it is not opposed to the principle of *res judicata*. Nor is it in conflict with the rule that domicil is to be ascertained with reference to the law of the situs, and with reference to that law alone. It is, therefore, as simple as the *renvoi* is difficult. It is equally applicable whether the deceased was domiciled at home or abroad, and whether the two countries differ as to his domicil or not. It is true that if there be a national difference as to domicil, the movables cannot devolve as a unit if they are situated in both countries. Thus if there are movables in France and England, and each country insists that deceased was

[1] Westlake, ch. 2.

[2] See p. 3, note 1.

domiciled in the other, the English movables will pass according to French law, the French movables according to English law. But the *renvoi* does not obviate the difficulty. If it be carried to its logical conclusion the property, as a unit, does not devolve at all, and if, to escape that difficulty, the *renvoi* be stopped after one reference back, unity of devolution is destroyed, for in that case the French movables pass by French law, and the English movables by English law. On principle, therefore, the law of the situs should incorporate the internal law of the domicil. The question therefore becomes, is the *renvoi* so firmly engrafted in the Common Law that the argument from authority is conclusive, even in the face of principle?

As has been shown, the *renvoi*, if logically carried out, involves a perpetual deadlock. But both England and America try the validity of a will of personalty by the law of the testator's last domicil[1]. And if the deceased died intestate his movables are in fact distributed in accordance therewith[2]. In other words, the Courts reach a result in both cases. Authority, therefore, is squarely opposed to carrying the *renvoi* to its logical conclusion.

But does authority support the *modified renvoi*, that is if it be stopped after one reference back? In *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441, where both the situs of the movables and the domicil of the deceased were English, it was held that English law determines the validity of the will. Here the result would be the same whether the *modified renvoi* or the internal law of the domicil be applied. But it must be reached by one method of reasoning or the other. If therefore this class of cases be claimed upon the reasoning, either as supporting, or as consistent with, the *modified renvoi*, its supporters must show that when English private international law was invoked as the law of the situs, it effectuated English private international law as the law of the domicil, but that when English private international law was invoked as the law of the domicil, it effectuated English internal law, since these are the steps dictated by the modified *renvoi* itself. Yet neither this case (which is simply selected as a type of both English and American decisions on similar facts) nor any other which the writer has discovered expressly proceeds on this reasoning. On the contrary, when the court has once ascertained domicil, it addresses itself to the internal law thereof without more. The same is true (so far as the writer knows) of decisions like *De Bonneval* v. *De Bonneval*, 1 Curt. Eccl. 856, where the validity of a will disposing of English movables, made by one domiciled in France (and upon this both English and French law agreed), was tested by

[1] See p. 2, note 4.

[2] See p. 2, note 5.

French law. This class of cases differs from the last only in the fact that the undoubted domicil of the deceased is foreign, instead of in the country of the situs. Here, also, the court, after deciding that the French domicil of origin continued till the testator's death, turns directly to French internal law. While, therefore, the *decision* in both classes of cases leaves the question open, the way in which the courts reach that decision seems opposed even to the modified *renvoi*.

Mr. Westlake, however, contends that the modified *renvoi* is established by the weight of authority [1]. But he conceives of private international law as a part of the law of nations, rather than of the territorial law of each country [2]. In other words, his view appears to be that for every case there can be but one rule of private international law, and that the rules laid down by each nation are but evidence from which the true rule may be deduced [2]. Thus in considering whether the *renvoi* is a part of English law he ascertains whether Italy, France, and Germany accept or reject it [1]. And having concluded that the weight of Continental authority is in favour of it, he then looks to see whether the English cases are opposed to the rule so established. This, of course, leads him to minimize the effect of cases difficult to reconcile with the rule, and to lay great stress on any features tending to bring England into accord therewith. Since, moreover, he does not concede the territorial supremacy of each nation in regard to the rules of private international law, he does not feel in regard to the *renvoi* the difficulties in principle, which beset those who accept territorial supremacy as a fundamental concept. To the latter, of course, foreign authority is persuasive only, and shows nothing as to English law. Mr. Westlake's contention, therefore, must be tested with reference to the English cases alone.

The English cases cited by Mr. Westlake to support the *renvoi* (p. 38) may be divided into four groups:—(*a*) *De Bonneval* v. *De Bonneval*, 1 Curt. Eccl. 856; *Hare* v. *Nasmyth*, 2 Add. 25; *Frere* v. *Frere*, 5 Notes of Cases, 593; *Crookenden* v. *Fuller*, 1 Sw. & Tr. 441; *Onslow* v. *Cannon*, 2 Sw. & Tr. 137; *Laneuville* v. *Anderson*, 2 Sw. & Tr. 24. (*b*) *Re Trufort*, 36 Ch. D. 600. (*c*) *Collier* v. *Rivaz*, 2 Curt. Eccl. 855; *Re Brown-Sequard*, 70 L. T. (N. S.) 811. (*d*) A dictum in *Re Johnson* [1903] 1 Ch. 821. In group (*a*) the typical case is *Hare* v. *Nasmyth*, *supra*, where the movables were in England, and both England and Scotland agreed that the deceased was domiciled in Scotland. A will had been there offered for probate, and the English court thereupon stayed proceedings to

[1] Westlake, ch. 2.

[2] Westlake, Introduction.

await the Scotch decision. This is simply the usual case, like *De Bonneval* v. *De Bonneval* and *Crookenden* v. *Fuller*, which have been already discussed. The decision would be the same whether the *renvoi* be accepted or rejected. Neither in this case, nor in any of the others is the *renvoi* referred to. Nor does the court reascertain domicil with reference to the foreign law, which is the very essence of the *renvoi*. When once domicil has been ascertained the substance of the reasoning is that the court of the situs will do what the court of the domicil would do under the circumstances. But this seems to point to the internal law of the domicil rather than to the *renvoi*. There is, admittedly, no national conflict as to domicil. The main issue is as to the foreign rule of succession. Of this the decisions of the court of the domicil are manifestly the best evidence. The court of the situs, therefore, should accept them as conclusive upon the question as to what the foreign law is[1]. That, however, does not mean that the foreign law, when so ascertained, is to be effectuated without question. Indeed the rule that the court of the situs will do what the court of the domicil would do under the circumstances is subject to two well-recognized limitations.

In the first place the court of the situs will not follow the court of the domicil in matters repugnant to public policy[2]. Thus in *Mahorner* v. *Hooe*, 9 Smedes & Marshall (Mississippi) 247, one domiciled in Virginia, by a will valid in all respects by Virginia law, directed the emancipation of certain slaves in Mississippi. This was forbidden by a Mississippi statute. *Held*, that this part of the will will not be effectuated. Similarly in *Desparel* v. *Churchill*, 53 N. Y. 192, the court declined to effectuate a trust of New York personalty, valid by the law of the testator's domicil (California), because it conflicted with the New York rule against perpetuities. In *Dammert* v. *Osborn*, 140 N. Y. 30, the principle was again affirmed, though the bequest was held not in conflict with public policy owing to special circumstances. In the same way, in *Succession of Petit*, 49 La. An. 625, the Louisiana court declined, because such succession was contrary to Louisiana public policy, to permit the bastard child of one domiciled in France to succeed to Louisiana movables, though having been acknowledged by his father, he would be entitled by French law to one-half of the movables of the deceased. The precise case (so far as I can discover) has not arisen in England, though the principle is recognized by both courts and text writers. There is, however, an interesting analogy in the case

[1] See *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; *Forepaugh* v. *D. L. & W. R. R. Co.*, 128 Pa. 217.

[2] Wharton, sec. 565; Dicey, p. xliii; Story, sec. 464, 472 (a).

of *bona vacantia*. In *Barnett's Trusts*, [1902] 1 Ch. 847, it was held that where one domiciled in Austria died leaving no personal representatives entitled to take according to Austrian law, a fund in England passed to the English Crown by virtue of English law, though by Austrian law it would have gone to the Austrian Crown. These cases, therefore, point strongly to the conclusion that the rule in question (that the court of the situs will do what the court of the domicil would do under the circumstances) is not a rule of substantive law, but a rule of evidence. The court of the situs accepts the decision of the court of the domicil as final as to what the law of the domicil is, but declines to effectuate it if contrary to public policy.

In the next place two English cases squarely hold that the law of the domicil *at the time of the death*, unaffected by subsequent retroactive legislation, is the law which will be applied. Thus in *Lynch* v. *Provisional Government of Paraguay* (1871) 2 P. & D. 268, Penzance, the Provisional Government of Paraguay sought the English movables of one who had died domiciled in Paraguay, by virtue of a law, passed since the death, which gave them to the state. The English court declined to effectuate this law and upheld the will of the deceased. The rule was again applied in *Re Aganoor's Trusts* (1895) 64 L. J. (N. S.) Ch. 521, Romer. In neither case was there any question as to the validity of the retroactive law in the country where it was enacted. The court of the domicil would, therefore, have been bound to enforce it. If then the court of the situs is to do what the court of the domicil would do under the circumstances, it also would have to effectuate the law in question. Yet this is precisely what the court of the situs declined in these cases to do. These cases, therefore, confirm the evidentiary character of the rule. If the court of the situs effectuates foreign law it will follow the court of the domicil, but this leaves open whether it will effectuate foreign law or not. In the light of these cases, therefore, the reasoning of the cases in group (*a*) gives the *renvoi* no more support than do the decisions.

Both these lines of authority, moreover, bear strongly against the *renvoi*. True, they do not distinguish between the private international law and the internal law of the domicil, since that question is not presented. But as we have seen, the *renvoi* if carried to its logical conclusion produces a deadlock between the law of the situs and the law of the domicil. Equality of force, however, is requisite for a deadlock. The full-blown *renvoi*, therefore, must be based on a supposed equality between the law of the domicil and the law of the situs. But clearly if the law of the domicil yields to the public policy of the situs it cannot be equal thereto.

These cases establish the supremacy of the law of the situs. They are, therefore, fatal in principle to the supposed equality between the law of the domicil and the law of the situs on which the full-blown *renvoi* must rest. They are, moreover, equally opposed to the modified *renvoi*. This, as we have seen, gives to the private international law of the domicil the last and controlling word as to what internal law shall regulate succession to the movables. In effect, therefore, it makes the law of the domicil supreme. But these cases emphasize the supremacy of the law of the situs at the very moment when it applies the law of the domicil. They are, therefore, fatal in principle to any theory which requires as a basis that the law of the domicil be either the equal or the superior of the law of the situs.

The next case cited by Mr. Westlake in favour of the *renvoi* is *Re Trufort*, 36 Ch. D. 600. Here one born a British subject became naturalized in Switzerland, and died domiciled in France, leaving movables in France, Switzerland, and England. His will was first offered for probate in the French Court, which finding that his nationality was Swiss, remitted it (in accordance with a treaty) to the Court of Switzerland. There the matter was fully litigated between the parties to the later English suit, and the son of the deceased (the English plaintiff) declared entitled to nine-tenths of the estate as his compulsory portion, as against the sole legatee under the will (the English defendant). The present action is brought to enforce the Swiss judgment as to the English movables of the deceased. *Held*, that the Swiss judgment concludes these parties. The facts, at most, show an interesting case of *renvoi* as between France and Switzerland, but that proves nothing as to English law. Nor is it material that indirectly this *renvoi* is effectuated by giving effect to the Swiss judgment. Since the time of Lord Ellenborough, England has enforced, without reference to the merits of the case, the judgment of a competent tribunal which had jurisdiction [1]. The present case, therefore, is an example not of *renvoi* but of *res judicata*.

The next group of cases cited by Mr. Westlake consists of *Collier* v. *Rivaz*, 2 Curt. Eccl. 855, and *Re Brown-Sequard*, 70 L. T. (N. S.) 811. In *Collier* v. *Rivaz*, the testator, who was domiciled in the English sense in Belgium, and in the Belgian sense in England, left a will in the English form disposing of English movables. The court held (1) that he was domiciled in Belgium, (2) that under the circumstances a will made in the English form was valid. Here, at least, the question of the *renvoi* is squarely raised by the facts, since the two

[1] *Buchanan* v. *Rucker*, 9 East 192, 9 R. R. 531; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670; *Doglioni* v. *Crispin*, L. R. 1 H. L. 301; cf. *Croudson* v. *Leonard*, 4 Cranch (U. S.) 434; *Overby* v. *Gordon*, 177 U. S. 214.

countries differ as to the domicil of the deceased. But it is not clear whether the case supports the *renvoi* or not. The result may be explained on the theory of reascertainment of domicil according to Belgian law, and a single reference back to English law as the law by which the validity of the will is to be tested. This is precisely the position advocated by Mr. Westlake. But it is not clear that the court took that view of Belgian law which was, of course, proved as a fact. The conclusion of the court appears to be that while one domiciled in Belgium in the Belgian sense must make his will in the Belgian form, one not so domiciled may make his will in the form authorized by the law of his own country. This does not involve the *renvoi* at all. Any country may divide possible testators into groups, and prescribe a different form of will for each group [1]. And the basis of division into groups may be nationality, religion, race, domicil, or the like. Thus Turkey may authorize Chaldaean Catholics to make their wills in a form different from that prescribed for Mohammedans [2]. An Englishman might equally be permitted to make his will as prescribed by the English Wills Act, while Frenchmen were allowed their own national form. Or a distinctive form might be prescribed for Causasians as distinguished from Malays, Mongolians, or Negroes. Clearly these would be but instances of a highly specialized Wills Act, which is part of the internal, not of the private international law of the country in question. Nor is this altered by making domicil 'in the Turkish sense' the basis of division. Here the second ascertainment of domicil is not the step precedent to ascertaining the 'law of the domicil,' but simply to determining in what class the Turkish Wills Act has placed this particular testator. In other words, we should in such a case ascertain domicil in the English sense to ascertain the 'law of the domicil,' and then after finding that the Turkish Wills Act divided testators into those domiciled, and those not domiciled 'in the Turkish sense' in Turkey, we ascertain domicil in the Turkish sense in order to determine which set of the forms presented is to be applied to this particular will. This, of course, involves neither the national conflict as to domicil, nor the second application of the rules of private international law, which are the two earmarks of the *renvoi*. *Mutatis mutandis* this seems to be the real explanation of *Collier* v. *Rivaz*, and also of *Re Brown-Sequard* (which without any reasoning came to the same conclusion as to a will made in like circumstances in France). And if such be the case they are in truth, not authorities in favour of the *renvoi*, but squarely opposed to it.

Moreover, unless this explanation of *Collier* v. *Rivaz* (1841) is

[1] *Abd-ul-Messih* v. *Farra*, 13 App. Cas. 431; Dicey, 678. Cf. Lord Kingsdown's Act, 24 & 25 Vict. c. 114.

[2] *Abd-ul-Messih* v. *Farra*, *supra*.

correct, that case is overruled by *Bremer* v. *Freeman* (1857) 10 Moo. P. C. 306, Wensleydale. There a will disposing of English movables was made in the *English* form by one domiciled in the English sense in France, but in the French sense in England. *Held*, (1) that the domicil of the deceased was French; (2) that the validity of the will is to be tested by French law; (3) that since the will is not in the French form it is invalid. This case is supplemented by *Hamilton* v. *Dallas* (1875) L. R. 1 Ch. D. 257, Bacon, which held that under similar circumstances as to domicil the English movables of an intestate were distributable according to French law. Here, as in *Collier* v. *Rivaz*, the facts squarely present the question of the *renvoi*, since there is a national conflict as to the domicil of the deceased. Had the full-blown *renvoi* been applied, the validity of that will, or the distribution of those movables, would be a secret to this day. Had even the modified *renvoi* contended for by Mr. Westlake been applied, there would have been a reference back to English law as the final arbiter, which would have led to precisely the opposite conclusion in each case. In both *Collier* v. *Rivaz* was cited. If, therefore, that case, as Mr. Westlake contends, supports the *renvoi*, the question was squarely brought to the notice of the court. But in neither case is there even a hint of reascertaining the domicil with reference to the foreign law, or of a reference back. The court turns directly, and as a matter of course, in the one case to the French law of wills, and in the other to the French Statute of Distributions. Had the *renvoi* been an unquestioned part of English law at that time, it is difficult to believe that it would have been so completely passed over, especially by so learned and eminent a judge as Lord Wensleydale. And even if the seeds of it had been unconsciously planted by the language of earlier cases, these two decisions are, until reversed (and *Bremer* v. *Freeman* was decided by the Judicial Committee of the Privy Council), a complete and permanent blight thereon. They have been, moreover, cited with approval, and followed by the single American case in point (so far as I can discover), *Harral* v. *Harral* (1884) 39 N. J. Eq. 279, which held that where one domiciled in the New Jersey sense in France, but in the French sense in New Jersey, married, the French rule as to community of goods between the spouses will be effectuated by New Jersey as to movables situated therein. In view of these cases, therefore, *Collier* v. *Rivaz* is either opposed to the *renvoi* or else is utterly overthrown.

The last authority cited by Mr. Westlake is a dictum, squarely in favour of the *renvoi*, in *Re Johnson* [1903] 1 Ch. 821. In that case the intestate, whose domicil of origin was Malta, died leaving movables in England, having obtained a domicil of choice, in the

English sense, in Baden, which Baden would not recognize because she had not obtained the proper authorization. *Held,* that since any prior domicil of choice has been abandoned, and since Baden will not recognize the domicil in the English sense acquired there, the Maltese domicil of origin of the deceased revived and was in force at the time of her death, and hence her movables will be distributed according to Maltese law[1]. Clearly this decision is no example of the *renvoi* since there is no reascertainment of domicil with reference to Baden law. True, Baden law is permitted to negative an undoubted domicil in the English sense, but is itself given no affirmative effect in ascertaining domicil. Instead the domicil of origin is adapted as a compromise. This is doubtless due to the fact that the case was treated as one of new impression. Both counsel and court overlooked the earlier cases, which held that domicil is to be ascertained with reference to the law of the situs only, to which this decision is directly opposed[2]. The dictum above referred to was laid down as one step in reaching this anomalous conclusion as to domicil. These circumstances certainly affect the weight of the dictum as an authority. It is, moreover, squarely in conflict with the decisions in *Bremer* v. *Freeman*, and *Hamilton* v. *Dallas*, *supra*, to say nothing of the American case of *Harral* v. *Harral*, *supra*. A dictum in the Chancery Division can scarcely be held to overrule a decision in that division based on a decision in the Privy Council, and hence those decisions, which are squarely opposed to the *renvoi*, must still represent the present English law.

In summary, therefore, we have the following propositions:—

1. Since the law of the situs is supreme, the law of any other country can have only that effect which the law of the situs may give it.

2. By the great weight of English and American authority, the law of the situs, in disposing of movables, will effectuate the law of the domicil.

3. By the great weight of English and American authority, the domicil of the deceased will be ascertained with reference to the law of the situs, and with reference to that law only.

4. The legal meaning of the phrase, 'law of the domicil,' with reference to the law of the situs is either (*a*) the private international law of the country in question or (*b*) the internal law of such country.

5. If the law of the situs and the foreign law differ as to the

[1] This decision has unfortunately been followed (though without discussion and as the single case in point) in *Re Bowes*, 22 T. L. R. 711 (Ch. D. 1906). There is a dictum to the same effect in *Dupuy* v. *Wurtz*, 53 N. Y. 556, 570.

[2] See p. 3, note 1.

criteria of domicil, and each effectuates the private international law of the other, there results an endless conflict as to domicil which never arrives at a rule of succession.

6. Mr. Westlake's suggestion that the *renvoi* be stopped after one reference back is open to three objections: (*a*) It makes English law contradict itself; if it be invoked as the *law of situs* it incorporates the private international law of the domicil, if it be invoked as the *law of the domicil* it incorporates the 'internal' law only. (*b*) It involves reopening the question of domicil, which has already been decided by the court of the situs with reference to the law of the situs, and a reversal, by that court, of its prior decision. (*c*) Since the ascertainment of domicil with reference to foreign law would be final (*ex hypothesi*), this is equivalent to ascertaining domicil with reference to the foreign law in the first place, which is contrary to the great weight of authority.

7. The present English law is settled adversely to the *renvoi* by *Bremer* v. *Freeman*, 10 Moo. P. C. 306, decided in the Privy Council in 1857, and followed in *Hamilton* v. *Dallas*, L. R. 1 Ch. 257 in 1875. Unfortunately these cases were overlooked in *Re Johnson* [1903] 1 Ch. 821, and *Re Bowes*, 22 T. L. R. 711 (Ch. D. 1906), which laid down a rule inconsistent therewith. The Privy Council case, however, remains the controlling decision. It is to be hoped, therefore, that when the question next arises, these cases may be noticed and on this point expressly disapproved. The single American case, *Harral* v. *Harral*, 39 N. J. Eq. 279, follows *Bremer* v. *Freeman*. At present, therefore, the *renvoi* cannot be considered a part of the Common Law, either on principle or on authority.

EDWIN H. ABBOT, JUNIOR.

THE LEGAL ESTATE.

IN the year 1830, Jeremiah Pilcher, an ideally just man, living in a blameless suburb, was minded to marry. It was not the first time that the idea had occurred to him or been acted upon. In fact he had been a partner in a former union (how dissolved history saith not), and of that union there had been fruit. Being, as was said, an ideally just man, Jeremiah Pilcher wished to provide, not only for his anticipated, but for his realized, offspring. His available cash amounted to the respectable sum of £11,373; and this he proposed to divide between his present and his prospective households in the proportion of £8,373 and £3,000; though we are not told upon what calculation he based this division. Each sum was accordingly lodged in the hands of a set of trustees, upon trust to pay the income to Jeremiah Pilcher during his life, and, as to the £3,000 to his intended wife (the lady whose appearance on the scene rendered these arrangements necessary) for her life, and, subject to these life interests, for the children of the two marriages respectively.

The names of the trustees of the smaller settlement are not revealed to us; but two facts, the one merely alarming, the other positively saddening, emerge from the history of the case; viz. first, that before the year 1856 W. H. Pilcher became sole trustee by survivorship of the larger settlement, and before the year 1860 of the smaller also; second, that W. H. Pilcher, despite the honoured name he bore, was a rascal. A combination of these two facts will prepare us for a tragedy; which in fact happened.

Both the settled sums had been invested on mortgage by one Rawlins, a property owner of considerable extent, on the security of several properties. The mortgage under the smaller settlement comprised the properties already mortgaged to the trustees of the larger settlement, and also some property not previously incumbered. There can be no doubt that Rawlins knew that both funds were trust moneys.

In the year 1856 a plot was concocted between W. H. Pilcher (the sole trustee) and Rawlins (the mortgagor), to make a haul by manipulating the funds of the larger settlement. Whether they intended to cheat the beneficiaries under the settlement or third parties does not appear. Probably they were indifferent on that point, and did not deem it necessary to make up their minds.

The plot was ingenious. By suppressing the mortgages to the Pilcher trustees, Rawlins was able to make out a title showing himself to be the unincumbered owner in fee of the properties comprised in the earlier mortgage. He then found some other trustees (Stockwell and Lamb) who were prepared to lend him £10,000 upon part of them; and to Stockwell and Lamb he accordingly professed to convey these properties by way of mortgage. Of course he could not have perpetrated this fraud without the connivance of W. H. Pilcher, who suppressed the mortgages which he held, allowed the other title-deeds to be handed over to the new mortgagees, and, naturally, divided the loot with Rawlins.

Now, if this had been all, the unfortunate new mortgagees would, of course, have got nothing beyond a third mortgage of the properties, and such satisfaction as the personal liability of W. H. Pilcher and Rawlins could have afforded them. But, for some unexplained reason, prior to the mortgage to Stockwell and Lamb, W. H. Pilcher had executed what professed to be a reconveyance to Rawlins of part of the properties comprised in the larger Pilcher mortgage, the legal estate in which was, as a matter of law, vested in him, W. H. Pilcher. But Stockwell and Lamb did not know of the existence of this deed till many years afterwards. So far as W. H. Pilcher's beneficiaries were concerned, and so far as Rawlins was concerned, it was an entire fraud; for, though expressed to be made in consideration of £3,500, no money passed under it, and its existence was concealed both from the Pilcher beneficiaries and the new mortgagees.

A somewhat similar fraud was practised by the same persons in 1860 with the funds belonging to the settlement on the second family, in respect of the other property comprised in the mortgages. The only points of difference between the two cases were that, in 1860, W. H. Pilcher professed to have purchased the property from Rawlins, and to be himself the mortgagor, and that no money was actually advanced by the new mortgagee, one Ward, to whom W. H. Pilcher had been ordered, as a defaulting co-executor, to give security. Here again, it will be observed, the new mortgagee did get the legal estate, but by quite a different title from that which he supposed himself to be getting. And, again, had he discovered the real state of the title, he must have discovered the existence of the trust.

The question was thus neatly raised, whether the bare fact that the new mortgagees unconsciously acquired the legal estate entitled them to priority over the earlier equitable title of the beneficiaries under the Pilcher settlements. Lord Romilly held that it did not; on the ground that they could not claim under the Pilcher mortgages and yet refuse to be bound by claims of which they must

have received notice had they known of those mortgages. But Lord Hatherley, though his own previous decision of *Carter* v. *Carter*[1] stood in his way, reversed this decision; being strongly supported by the other members of the Court of Appeal (James and Mellish L.JJ.), who said as unkind things about *Carter* v. *Carter* as they well could in the presence of the author of that decision.

Pilcher v. *Rawlins*[2], be it observed, was not decided on any grounds of laches on the part of the Pilcher beneficiaries. If the Court had chosen to say that they were to blame for allowing W. H. Pilcher to remain as sole trustee of the settlements, that principle would have been intelligible, though severe in its application. But the decision would, it is conceived, have been the same if there had been another trustee who had shared in the fraud, or if the Pilcher children had been infants in arms, or even unborn, when the fraud was committed. Mellish L. J. did indeed attempt to justify the decision as 'in accordance with the ordinary feelings of justice of mankind'; on the ground that the Pilcher beneficiaries had lost their money because their father had placed it in the hands of a dishonest trustee. But even if this be not too legal a view for laymen, it may be pointed out that the decision would have been just the same if Stockwell and Lamb's £10,000 had been *bonâ fide* received by W. H. Pilcher, and lost by an unavoidable accident; whilst, on the other hand, it would have been entirely different, but for the pure caprice of W. H. Pilcher in executing the concealed reconveyance to Rawlins. In fact, *Pilcher* v. *Rawlins*, which has often been followed, is authority for the absolute legal rule that, as against a purchaser for value of the legal estate, without notice, and without negligence, no equitable interest, of however long standing, is of any avail. And the question arises, whether this rule is justifiable at the present day.

Like so many rules of English law, it has, of course, grown up from remote antiquity. The oldest kind of equitable interest known to the Courts, and still by far the most important kind, is the interest of the *cestui que trust* in the property held on his behalf by a trustee. Such interests, as every English lawyer knows, first made their appearance in the days when the only estate in land of which the King's Courts took notice was the estate evidenced by seisin, or at least by possession[3]. Inasmuch as seisin of the land carried with it liability to public services, it was extremely natural that the King's Courts (including even the Court of Chancery, the special protector of the trust) should decline to recognize the claims of the merely beneficial owner against the person who, without

[1] (1857) 3 K. & J. 617. [2] (1872) L. R. 7 Ch. 259.
[3] How there came to be legal possession which was not seisin is another story.

fraud, had taken upon himself the burdens of seisin. Even the Court of Chancery could not fix a conscientious stigma on such a man. It may be further added that, as the transfer of seisin, or even of a termor's possession, was a notorious fact, the *cestui que trust*, at any rate if he were of the age of discretion, had an opportunity of forbidding the banns.

A similar argument would apply to the case of the second type of equitable interest recognized by the Court of Chancery, namely that of a purchaser who had paid his money, but had not taken a conveyance. A person who had been so foolish deserved to be set aside in favour of a subsequent purchaser who had no notice of the previous sale.

But when the Statute of Uses made secret conveyances of the legal estate possible, the position changed at once. The artificial seisin of the statute differs *toto coelo* from the *de facto* seisin of the common law; a fact which the Courts of Law recognized in refusing to allow it to be made the basis of an action for trespass[1]. The *cestui que trust* might not know of its existence; it might flit, like a will-o'-the-wisp, along a whole series of executory limitations. Again, the Statute of Uses came at a time when feudal services were rapidly becoming extinct, and when the tendency of Parliament and Courts alike was to transfer the other incidents of tenure from the legal to the equitable estate. The rule which preferred the legal estate was, in fact, becoming illogical at the end of the sixteenth century.

It may perhaps have been that the Courts clung to the view that a trust was such a personal relationship that it ought not to be transferred. This we know was the original view even of tenure; though it had disappeared long before the sixteenth century. But, whatever may have been the intention of that weird statute the 1 Ric. III, c. 1, it was hardly possible, after the passing of the Statute of Frauds, to argue that even the assignment of trusts was not recognized by the law; while, in respect of the interests of purchasers and mortgagors, no argument from fiduciary relationship would apply, though there are traces in the books which seem to suggest that the person who attempts to deal with an equity of redemption is, *primâ facie*, a rogue[2]. The Statute of Frauds even made some equitable interests liable to extension by *elegit* (though it is difficult to see how the process could have worked); and Lord Kenyon, that stickler for propriety, in 1789 held that a poor-law settlement was acquired by a man who had resided with his wife on land settled to her separate use[3]. In 1818, however, the King's Bench refused

[1] *Lutwich* v. *Mitton* (1621) Cro. Jac. 604. [2] 4 & 5 W. & M. (1692) c. 16.
[3] *R.* v. *Offchurch* (1789) 3 T. R. 114.

to extend the same privilege to the mother of the heir of a purchaser who had taken no conveyance; saying that there could be no guardian in socage of an equitable interest[1].

Nevertheless, it may perhaps fairly be claimed as a partial justification for refusing to accord equal recognition to the claims of the equitable interest that, until comparatively recent times, there does not seem to have been much dealing in such interests. Throughout the classical collections of conveyancing precedents, from the time of Sir Orlando Bridgman to the end of the eighteenth century, there is an apparent dearth of forms for conveying equitable interests. Bridgman himself, it is believed, gives no such precedent; nor does Lilly, whose *Practical Conveyancer* was published in 1719. Piggot (1742) has three conveyances of equities of redemption; but in one the mortgage is paid off, and the term assigned in trust to attend the inheritance, in another the mortgagee purchases the mortgagor's interest, and the third is a voluntary settlement of land subject to a mortgage. In Newman (1788) the only two are conveyances of equities of redemption upon trust for the mortgagor's creditors. In all these collections, settlements of land are effected by limitations of successive legal estates, not by way of trust for sale; and, though settlements of pure personalty begin to make their appearance with the appearance of South Sea stock and life assurance policies, the beneficiaries under such settlements would appear to have resorted, when they wished to raise money on their expectations, to persons who did not trouble themselves about getting formal assurances of their clients' interests. No doubt the lenders protected themselves in other ways.

With the commencement of the nineteenth century, however, things began to change. Preston (1806), it is true, appears to confine himself to a cold discussion of the question whether an equitable interest in land will pass by a mere grant without feoffment or lease and release. But Barton (1805) recognizes freely the alienability both of a trust estate and an equity of redemption; and Bythewood (1830) gives precedents for the conveyance of an equity of redemption and of a life interest in stock. The later collections, of course, recognize more and more fully the amount of business done in equitable interests; and the question now is: whether the existing rule about the preference of the legal estate is, or is not, to the interest of a public which has made up its mind to deal in such securities.

Historically, the rule which gives absolute preference to the legal estate became finally indefensible from the passing of the Judicature Act, which put an end to that interesting but archaic feature of

[1] *R.* v. *Toddington* (1818) 1 B. & Ald. 560.

medievalism, the relativity of law. It may have been well, in the fourteenth century, to give a man a right which would only be protected by a particular tribunal; for quite possibly he might not otherwise have got it at all. It was better that a man should have an interest which would be recognized only by the Court of Chancery or the Court Merchant, than that he should have no interest which any court would recognize. But the practice led inevitably to conflict of jurisdictions, not always decided in favour of the more righteous cause; and it is absolutely inconsistent with the modern ideal of one law for all people in all the courts of the land. And now that every court administers law and equity concurrently, it would seem that the survival of the strict rule is due to a somewhat unintelligent application of the well-known provision of the Judicature Act: that, in a conflict between Law and Equity, the latter shall prevail. For, though Courts of Equity, before the Judicature Act, would not take away the legal estate from a *bonâ-fide* purchaser, it can hardly be said that this rule was the result of equitable principles. It marked the limit of the power asserted by the old Court of Chancery, no doubt. But we can hardly deduce from the fact that a parson refrains from excommunicating a man who marries his deceased wife's sister any parsonic approval of such marriages.

The question appears to remain, then: whether the preference of the legal estate has anything to recommend it from the standpoint of utility. Does it perform any functions which could be better performed by any other principle?

One of the most conspicuous distinctions between the legal estate and the equitable interest is not in all respects a preference for the legal estate. Broadly speaking, a legal interest in land (other than a copyhold interest) can, by act *inter vivos*, only be created, transferred, or destroyed by deed under seal, accompanied by the use of technical terms; while an equitable interest can be created, transferred, or destroyed *inter vivos* by mere signed writing[1], and (though this would appear to be more doubtful) without the employment of technical language[2]. As respects dealings by testament, both stand on the same footing. No doubt it is convenient to make conveyancing as simple and easy as possible; and, in this respect, the absence of the necessity for a sealing and delivery, and the laxity on the subject of technical terms, in the case of dealings with equitable interests, may be said to be convenient. On the other hand, there is danger in too facile transfers and in vague language;

[1] Statute of Frauds, ss. 1–3, 7, 9; Real Property Act, 1845, ss. 2, 3.

[2] *Re Tringham's Trusts* [1904] 2 Ch. 487; *Re Oliver's Settlement* [1905] 1 Ch. 191. *Contra*: *Re Whiston's Settlement* [1894] 1 Ch. 661; *Re Irwin* [1904] 2 Ch. 752.

and it may well be that a third form of conveyance, free from the antiquarian pedantry of a deed, but a little more solemn and strict in its language than a mere casual letter, might be advantageously demanded for all conveyances of land.

So far as corporeal chattels are concerned, the differences are not so easily disposed of. The legal ownership of corporeal chattels may be acquired *inter vivos* by delivery, by deed, or (subject to s. 4 of the Sale of Goods Act) by sale without delivery. A trust of goods can be declared by word of mouth; but it cannot be granted or assigned [1], though probably it may be surrendered, without writing. As respects choses in action, they cannot (with certain well-known exceptions) be legally assigned without writing, and, in some cases, they require a deed; but an equitable assignment may, subject to the rule requiring valuable consideration, be effected by word of mouth [2]. It is very doubtful whether this last rule does not work more mischief than it prevents.

But we can hardly judge the conveyancing question as to the form of transfer, till we realize the practical difference in the powers conferred by the legal estate and the equitable interest. Here, again, the position has been greatly altered since the rule we are discussing was laid down. Originally, the remedies of the equitable owner were only against the holder of the legal estate out of which the equitable interest had been created, and his representatives and successors. But, within the last half-century, well-known statutes have conferred important powers on the equitable owner, in respect of dealings with strangers. It is sufficient to refer to the Improvement of Land Acts, the Judicature Act, 1873, s. 25 (5), the Conveyancing Acts, and, above all, the Settled Land Acts. From one logical consequence of these Acts the Courts have, however, shrunk. They will not admit the right of the equitable owner to possession of either land or goods; though, in the exercise of their discretion, they will allow him occupation [3]. This distinction may have important practical results; as, for example, where a bill of sale holder, whose mortgage allowed the borrower legal possession until default, was not allowed to bring trespass against a stranger who seized the goods [4]; while another bill of sale holder, whose mortgage made him trustee of the possession for the borrower, was allowed to do so, though the borrower was in actual occupation [5]. It results from the rule which denies possession as of right to an equitable owner, that the latter, save so far as he is within section 25 (5) of the Judicature Act, 1873,

[1] Statute of Frauds, s. 9.
[2] *Heath* v. *Hall* (1812) 4 Taunt. 326; *Tibbitts* v. *George* (1836) 6 Nev. & Man. 804; *Gurnell* v. *Gardner* (1863) 4 Giff. 626.
[3] *Re Bagot* [1894] 1 Ch. 177; *Re Newen* [1894] 2 Ch. 297.
[4] *Barker* v. *Furlong* [1891] 2 Ch. at pp. 179-80.
[5] *White* v. *Morris* (1852) 11 C. B. 1015.

cannot sue strangers in his own name for the profits of his interest or for damage done to the land. It is conceived, for example, that the *cestui que trust* of a chattel has not even the rights of a temporary bailee against strangers.

Surely this state of things is anomalous and unsatisfactory. The claim to possession can hardly arise where more than one person is interested at one time; but, in such cases, unless the creator of the trust has expressly forbidden it, the equitable owner should be given possession, and allowed to exercise all the rights of a possessor. The separation of possession and beneficial ownership is always *primâ facie* undesirable in the interests of the public, especially in the case of chattels. Where the equitable owner is an infant, his guardian should be allowed to exercise his rights. The danger to the property would be no greater than at present; and, in the case of goods, could be guarded against by compelling a limited owner to give security. A mortgagee could, of course, protect himself by taking possession at any time, if the mortgagor threatened to damage the property; the vendor cannot be compelled to part with his possession or his title deeds until his purchase money is paid; and the purchaser would be very foolish if he did not then obtain both at once.

But, of course, the most important function performed by the rule which prefers the legal estate is that with which we started. It decides which of two equally innocent persons is to bear an inevitable loss. This is a valuable function; but it may be doubted whether the rule performs it well.

In the first place, it only performs it when the peculiar circumstances of the case lodge the legal estate in one of two innocent rivals. Suppose that, in *Pilcher* v. *Rawlins*, the secret re-conveyance from W. H. Pilcher to Rawlins had not been executed. The decision must have been the other way. And yet it is difficult to see how the morality of the position would have been different. Worse still; suppose that Rawlins, instead of producing the re-conveyance in the course of the proceedings, had continued to conceal it until a final decision had been given. He might then have blackmailed the successful parties to almost any extent, by threatening to make the unsuccessful parties acquainted with it. Rawlins, though in fact one of the villains of the piece, was arbiter of its destinies.

Or again, suppose that, by some event unknown to any of the parties when they lent their money, the bare legal estate in the land had been outstanding in some person buried in the Australian bush, or wandering about the steppes of Central Asia. The decision would have been entirely different. But again it is difficult to see how the merits would have been affected.

In the second place, this preference for the legal estate sometimes positively encourages practices of a very doubtful character. The doctrine of tacking is probably fair enough when it enables a first mortgagee to get priority for his further charge over a second mortgagee of whose claims he was ignorant when he made his further advance. The second mortgagee should have given him notice. But the morality of the situation is very doubtful when a third mortgagee is allowed to 'squeeze out' a second, by getting in the first mortgage after notice of the latter's claims; or where the purchaser of an equity of redemption at an undervalue is allowed to defeat the claims of creditors who have actually obtained judgment setting aside the sale, by getting in the outstanding mortgage[1].

Nor, in the third place, would an interference with the rule leave us without a rudder to steer by; for the rule itself is but an exception to a much wider and more justifiable principle: *qui prior est tempore, potior est jure.* That is a principle founded on solid reason. The older title cannot, in the nature of things, be aware of the later; the converse is by no means true. The longer a man has enjoyed a right, either in possession or anticipation, the keener will be his suffering if it is taken away. But even priority of time is not by any means always a perfect plea. If the prior title, though free from all moral taint, is affected with carelessness which has enabled a third person to commit a fraud upon the later title, the prior title will be postponed, though there could have been no question of notice. That is the recent case of *Walker* v. *Linom*[2]. There a man conveyed real estate on his marriage to trustees, and professed to hand over to them the title-deeds, but in fact retained the leading deed, viz. the conveyance in fee, to himself. The trustees carelessly omitted to examine the parcel containing the deeds. The settlor professed to mortgage the property to a stranger, handing over the conveyance. The facts were discovered; and it was held that the trustees, though they had the legal estate and were prior in title, were postponed to a *bonâ-fide* purchaser from the mortgagees; though he had, strictly speaking, no interest in the land at all.

In fact, it would seem that there is a large class of cases, of which *Pilcher* v. *Rawlins* is a typical example, where neither the technical rule which was applied in that case, nor the rule of *prior in tempore*, represents the highest effort of the human mind in search of justice. Why should not, in such cases, the loss be equally divided between the innocent parties? No doubt the adjustment would not always be very easy; but the machinery of the Chancery Division, at any rate, performs more complicated functions, in

[1] *Bailey* v. *Barnes* [1894] 1 Ch. 25.

[2] [1907] 2 Ch. 104.

dealing with administration actions, than most of such cases would require. Or again, why not adopt the principle that a *cestui que trust* is absolutely bound, as against innocent strangers, by his trustee's misconduct. That would be an intelligible proposition; though, doubtless, it would work hardly in some cases. It is to be remembered, however, that very powerful machinery for the protection of *cestuis qui trustent* has recently been set up; and if settlors and beneficiaries do not choose to avail themselves of it, it will be hard to hold them not responsible for frauds on strangers which private trustees may commit. But it must again be pointed out, that the real absurdity of the doctrine on which *Pilcher* v. *Rawlins* was decided is best shown by the fact that, up till the last moment, it lay in the power of a rogue to decide, perhaps by the mere toss of a coin, which of two innocent parties should bear the consequences of his fraud. Whatever rule may be right, it seems hardly possible that a rule which leads to such a result can be right.

EDWARD JENKS.

[With regard to the assertion incidentally made by our learned contributor on p. 154, that a *cestui que trust* of a chattel, having custody and control thereof in fact, has not possession in law, we do not think it acceptable. If he has not possession the only alternative is that he has mere custody like a servant. But the case of a servant has always been regarded as peculiar; the inclination of the Common Law is not to separate possession from physical control. Moreover, the analogy of land held on trust, as to which there is no doubt, leads us to believe that the holder of a chattel as *cestui que trust* is at common law a bailee at will, and either he as actual possessor or the trustee as constructive possessor (being entitled to resume possession at will) can bring trespass.—F. P.]

MODERN ROMAN DUTCH LAW[1].

IN approaching the subject of my lectures for the legal year which has just commenced, I think it desirable at the outset to give an outline of Roman Dutch law and its history. In order properly to understand and appreciate this law as it exists at the present day, it is necessary to trace it historically, and it is from this standpoint that I shall attempt to treat it. And I venture to hope that I may be able, to some extent at least, to justify the laudable experiment of the Council of Legal Education in making provision for the teaching of one of the most important laws of the Empire.

I.

What is Roman Dutch law, and what is understood by its modern development?

Nowhere can we lay our hands on a book or digest which gives us Roman Dutch law in a form sufficiently concise to give the student a clear and complete idea of the law which the Colonies of Ceylon, British Guiana, and South Africa inherited from the Dutch colonists of the seventeenth and eighteenth centuries. This law is a growth, an historical development, temporarily arrested in its course by political and economical upheavals, then continuing it—though in somewhat other directions—with increased vigour and undiminished vitality.

Of Germanic origin, bred in the towns and Provinces of the Low Countries, it was wedded to the law of the Roman Empire, which first appeared in its Justinian attire, but of late has assumed the modern garb woven from the results of the researches of nineteenth-century jurists. With ever renewed vigour it enjoys all the privileges of an irrepressible youth.

Its development in the Netherlands[2] may be divided into four periods, of which each possesses its own characteristics.

1. The period of the German tribes. Of this period very little is known with any degree of certainty.

2. The Frankish period. This period begins with the reign of Clovis, during which the Frankish kings succeeded in centralizing

[1] An Inaugural Lecture delivered on October 23, 1907, by W. R. Bisschop, LL.D., of Lincoln's Inn, Barrister-at-Law, Lecturer on Roman Dutch law in the Inns of Court.

[2] Burge, Colonial and Foreign Law, new edition, vol. i, p. 65 sqq.

their power, and attempted to establish unity of law among the different tribes over which they ruled. Proof of this were the *leges* —such as the Lex Salica, the Lex Saxonum, the Lex Frisionum, and the Lex ad Amorem—which codified the common law of particular tribes, together with the king's *capitularia* which were ordinances or statute law for the whole territory over which he reigned, and the collections of *formulae* and deeds which formed precedents for royal decrees and all manner of instruments. Along with these *leges scriptae* the King's Courts were established for the administration of the king's law, as distinguished from the tribal customs observed by the People's Courts and called the people's law.

The end of this period was signalled by the loss of the king's power, when the counts—the government officials for the administration of the country—gradually threw off their duties as such and began to exercise their administrative powers as rights which they claimed to exercise in their own name.

3. The period of the growth of independence of the Courts in the Low Countries. In the Netherlands the disintegration of the kingdom (referred to in the second period) markedly manifested itself. In this third period we find a number of counts whose territories were clearly defined. In each of these counties, duchies, seigniories, the law made its distinct development, in each a legal system grew up by itself though each of them showed traces of their common origin. The diversity of customs rendered the general view a kaleidoscopic one. In addition, new Courts were established with jurisdictions to settle disputes regarding particular relations in law or regarding particular classes of the population.

Feudal Courts, manorial Courts, the *forum privilegiatum* of the noblemen, were instances of separate jurisdictions besides the public Courts of the counts and of the hundreds which administered the *landrechten* (rural laws), and the Courts of the towns which administered the *stadrechten* (civic laws). Besides these there were those of smaller pretensions and of minor importance, the *baljuwschappen, dijkgraafschappen, schoutambten*[1].

The law as administered in these diverse communities may be learned from the old *privileges* which were granted by the authorities. They generally recognized the customary law, and may be found in charters, *plakaten*, ordinances, and instructions; also in the *keuren* of town and country containing the rules and regulations made by the civic authorities concerning their own affairs and by

[1] For a description of these Courts, vide Kersteman, Holl. Regtsgeleerd Woordenboek, I, Voce *Bailliuw, Dijkgraaf*; and Fockema Andreae, Bijdrage tot de Nederlandsche Rechtsgeschiedenis, IV, 358 sqq. et seriatim.

the servants of the Crown in the country; and in the personal *privileges* granted to certain classes of the population.

All these feudal, rural, and civic laws were collected in books, like (*a*) the books of charters and placards of the different counties (afterwards called Provinces); (*b*) the collections of customs and *keuren* of the towns and other jurisdictions; (*c*) the collections of old judgments, of charters and *formulae*; (*d*) the legal writings and draft codes for towns and counties; and (*e*) the royal ordinances.

4. The period of the Republic of the United Seven Provinces. The Republic came into existence in 1581 with the abjuration of Philip II of Spain. The change of authority from the sovereignty of the King to that of the States did not involve any marked difference as to its legal history.

The independence of the Provinces in regard to their own laws and customs remained intact; yet, there were two characteristics of this period which tended towards uniformity. One was the endeavour, more or less successful, of the Provincial States to codify the laws and customs of each Province (these codifications may be found in the so-called *Landrechten*). The other manifested itself in the decisions of the Courts of Appeal and the increased influence of the lawyers through whom the Roman law acquired recognition.

Originally the Courts in the Provinces were People's Courts, where the assembled freemen gave the verdict. After the people ceased to take a direct part in the administration of justice the authority of the Courts passed into the hands of the nobility and the representatives of the town. A further development placed the authority in the hands, principally, of lawyers (1) through their opinions and (2) through the Courts of Appeal of which they formed the majority [1].

Courts of Appeal were established in nearly all the Provinces, and were either developments of the council of the count or had grown out of the popular institutions which were in vogue as superior judicial assemblies in the Middle Ages.

In vain attempts were made in the course of time to establish one Supreme Court for all the Provinces. The Dukes of Burgundy endeavoured to do this through their Great Council of Mechlin. The Supreme Court established by Charles V, which was intended to act as a Court of Appeal for the Northern and Southern Netherlands, ceased to act as such on the outbreak of hostilities between Spain and the Northern Netherlands in the second half of the sixteenth century, inasmuch as the Southern Provinces, and with them Mechlin, adhered to the Spanish rule.

[1] For the development of these Courts cf. Burge, loc. cit., i, pp. 73 sqq.

The Supreme Court (Hooge Raad) which was established in April, 1580, by the States of Holland, and since the treaty of 1587 extended its authority over Zeeland as well, never possessed any authority beyond these two Provinces.

The tendency of these Courts has certainly been towards the unification of the law in each Province, and in Friesland the attempt was undoubtedly successful, although their decisions were not binding upon one another. The doctrine of *Stare decisis* was never adopted in the Low Countries, and the influence of the Courts was never based on authority. As the Courts of Appeal, however, formed the last resort of the litigant, and generally consisted of lawyers of repute, their influence made itself felt, because it was known that the interpretation once adopted by them would probably be followed and logically extended to analogous cases.

But the independence of the several Provinces, and the difference in the development of their legal institutions, prevented this influence from spreading beyond the boundaries of each Province, and these, together with the great anxiety of the lower Courts to preserve the customs of the country against the influence of the Roman law, and of the towns to retain their own rights and privileges, were so many hindrances to the unification of the law by means of judicial decisions.

Roman Law. What neither legislation nor jurisdiction could effect, the Roman law did. Not at once or by force, not everywhere at the same time or to the same extent. Its work was slow, but sure. As a unifying element the Roman law had great advantages over all the others. Forming a solid substratum upon which the law could be built, it was a never failing source of clear thought and logical argument for all those who needed a guide where local law was silent or too multifarious in its diversity. While, however, its influence increased, it never disturbed the development of the customary law. It has retained this characteristic throughout the ages, and it will be my object to trace shortly the history of this evolution.

Brought to light from the monasteries, the civil law found a favourable reception at the Universities, and those who had studied law there remained lifelong admirers of the legal system and codification of the Romans. The fact that the law of Rome was handed down to posterity in a codified form, and the fact that at one time University studies were guided by ecclesiastics whose canon law was based on the civil law, and who did not recognize the laws made by any temporal power as having authority over the Church, were two important reasons for the popularity of Justinian's legislation.

The Dutch Universities have played a greater part in the develop-

ment of the modern Roman law than any others in Northern Europe. On them rested the mantle which had fallen from the shoulders of the French when religious persecutions stopped the progress of culture and drove the learned away. The massacre of St. Bartholomew may be taken as the date when the Dutch took up the task which had been partially abandoned by the French. The Dutch soon became pre-eminent in paraphrasing and explaining the civil law as codified by Justinian. Not content with this, however, they devoted special attention to legal history. Their proficiency in these studies gave a peculiar character and value to their labours, and thus was formed the Dutch school, which, together with the Spanish, may be said to have been mainly instrumental in advancing the study of civil law during the seventeenth century and the first half of the eighteenth.

If any weight be attached to the legal conceptions of Roman jurists, the importance of those researches can hardly be overestimated. The study of Roman law has passed through several stages, from the mere commentaries of the earlier centuries to the historical and analytical dissections of modern times. So continuously has it formed a subject of new and ever more elaborate methods of explanation, that its study may be grouped according to distinct stages of development. Thus the history of each epoch becomes not only interesting, but necessary, for the understanding of the whole structure of modern Roman law.

The codified law of Justinian of the sixth century was recognized throughout civilized Europe as a source of legal wisdom, and as the principal guide in the administration of justice. It formed the fundamental basis of legal thought in France, in Holland, and in Germany. The learned jurists at the Dutch Universities, as practical men, went a step further than the commentators of former days, and did not reproduce in their works the pure law of the Romans only, but presented it adorned and enriched with the decisions of the courts and their own opinions. We do not find in their books the law as it was in the time of Justinian, but the law as it was in their own days, based, however, on Roman principles. Thus they created a Roman Dutch law, of which the Roman law formed the framework and the most important portion, with Dutch additions, consisting of the local laws and customs of the greatest commercial nation of the time and decisions of its Law Courts.

Those among these jurists who were more particularly concerned to explain the civil law as it appeared in the Codes of Justinian—to which they added in notes of their own the law of their own times, either by way of explanation or example, or as differing from the original ideas—remained the true interpreters of the civil law,

and the value of their work still remains unimpaired. They kept the Roman law alive by the application of its principles to the occurrences of daily life. As society moves forward, relations and circumstances alter and frequently demand new provisions to meet their requirements. But the principles laid down by the ancients remain applicable, and the more extended the interpretations the more clearly those principles are brought to light.

Those who studied under the eminent jurists who made the University of Leiden famous throughout the civilized world, afterwards, as advocates and as judges, carried with them the classic spirit imbibed at their *alma mater*.

When the Roman influence began to make itself felt in Northern Europe the administration of justice there was in the hands of the people, or, to be more precise, in the hands of laymen. In the Universities lawyers were trained, and wherever the assistance of the trained lawyer was required the civil law gained its admission into the jurisprudence of the country, and an opportunity was afforded it to influence the law of the land. With the gradual surrender of jurisdiction into the hands of lawyers and the minimizing of the popular element in the courts of justice, the predominance of the law of Rome became more certain and secure.

This is called the 'practical reception' of the civil law, in opposition to the 'theoretical reception,' by which is understood the idea of the continuation of the Roman Empire by the German Emperors, and their recognition of the Codes of Justinian as the law of their predecessors by which they were bound.

While, however, this theoretical reception comprised the *Corpus Juris Civilis* in its entirety, it extended in practice to the jurisprudence which was built upon it by the Italian commentators.

Besides the Justinian Codes, there were comprised in the 'reception' the *Corpus Juris Canonici*, with an authority which was extended from the ecclesiastical to the civil courts, and the feudal law of the Longobards as compiled in the *Consuetudines* or *libri feudorum* and added to the *Corpus Juris* as a supplement to the *Novellae*.

The Roman law thus acquired in the Dutch Republic a greater authority in practice than was assigned to it by law.

It is self-evident, however, that this could only apply as regards certain portions of the Roman law. With people of a different race, whose ideas and customs were diametrically opposed to the patriarchal notions of the Romans, the law brought from Southern Europe could not fit all circumstances of life. The number of *leges abrogatae* mentioned by van Groenewegen is an indication of the phases of life to which the civil law was not applicable.

In other matters, especially commercial law, the times had moved onward and new circumstances had developed new customs which required new law.

This was the principal reason why, whenever Roman law was resorted to in the administration of justice, it was not the Justinian Code which guided the judges, but the interpretation thereof by learned University teachers. In cases of doubt, when custom and statute were silent, it was not the Institutes or the Digests which the judge consulted and expounded, but he applied the law according to the interpretation given by the learned jurists of the day.

The civil law did not become the common law of the country, but remained a source of wisdom for the justiciary to draw upon in case of need. And the justiciary needed it interpreted, ready for use in particular cases, and for this they looked to the Universities and their learned professors.

Doubtless in these matters extremists existed. To a number of law students it seemed an easier task to grasp the Roman law in codified form than to wade through a perplexing mass of customs and learn not to supplant them, but to apply to them the Roman law principles.

The ignorance of the common law of their own country, and the difference between that and the Roman law which they had exclusively studied, made them unjust towards their own common law, the principles of which they ignored and replaced by the principles of the only law they knew, for which there was neither necessity nor any cause other than ignorance.

Hence a struggle for existence and recognition on the part of the common law which, though it did not impair the influence of the Roman law, prevented it from becoming dogmatic or stereotyped, as even common law and equity are apt to do if not kept in constant and close touch with the exigencies of life.

Holland has been fortunate enough to have had a scholar who took the trouble to write down the law of his day, unvarnished and unbiased, and to leave to posterity a guide, which with its many editions, notes, and annotations has remained ever since, more than any other work, a sound basis for the study of Roman Dutch law. The *Introduction to Dutch Jurisprudence* of Grotius, with the annotations or notes by Schorer, and the *Theses Selectae* of van der Keessel, continued to be used till the end of the Republic.

Grotius's work is invaluable, as it states the law as he found it in practice before the Courts. In that respect it has the character of a codification of the law of Holland at the beginning of the seventeenth century.

Twice afterwards similar books were written, giving the law of

the day, viz. by Simon van Leeuwen at the end of the seventeenth and Johannes van der Linden at the beginning of the nineteenth century. Both were lawyers in the Province of Holland.

As explained above, the commentators at the Universities worked from another standpoint. They approached the law of their country through the Roman law, taking that law as a basis, commenting upon it and then applying it to the laws of their own days or stating how far the Roman law was abolished. Most famous amongst these was Johannes Voet, whose *Commentarius ad Pandectas* remains the great work of reference at the present day.

They adapted the Roman law to the laws and customs of their country, and their interpretation of the civil law has long remained authoritative. It was their school which so greatly influenced the mind of Pothier, whose writings are still embodied in the principal Codes of Europe.

Both methods of explaining the Roman Dutch law have their advantages, and both should lead to the same result. Together they teach the stability of legal principles and the gradual change and development of custom to which these principles have constantly to be logically applied.

II.

While the development of Roman Dutch law in the period of the Republic went on in the Netherlands, the Dutch had found their way to the Malayan Archipelago, and in 1602 founded their United East India Company, which was to hold sway over the Dutch East Indies for nearly two centuries. The Company carried to its Eastern possessions the law which was administered at home.

By its charter, a trading monopoly and sovereign powers were granted to the Company [1], and soon after it had established a permanent settlement in the East these powers were set out in detail in the instructions of 1609, 1613, 1617, 1632, and 1650 given by the Directors (or, as they were generally styled, the Council of XVII) in Holland to the Governor-General in Council, the first three having the express sanction of the States-General [2]. These successive instructions granted various powers as they were wanted, while the powers contained in the earlier instructions were maintained and elaborated in the subsequent ones. Thus they grew in clear-

[1] Arts. 34 and 35.

[2] T. Mÿer, Verzameling van Instructiën, Ordonnanciën en Reglementen voor de Regeering van Nederlandsch-Indië.

Encyclopaedie voor Nederlandsch-Indië, *sub tit.* Indië (Administratie der Compagnie in) by Professor J. E. Heeres.

G. C. Klerk de Reus, Geschichtlicher Ueberblick der administrativen rechtlichen und finanziellen Entwicklung der Niederländischen Ostindischen Compagnie.

ness and completeness, and the last one of 1650 contains a full constitution for the government of the possessions of the East India Company, not only those in the Malayan Archipelago, but all of them wheresoever situated. This constitution remained in force until the Company's possessions were taken over by the Republic in 1798.

The powers of the Governor-General in Council were very extensive, and not only concerned the servants of the Company but also those who had settled in the Company's dominions as private persons [1]. The Governor-General in Council appointed the Governors and Councillors of the settlements outside Java, like Ceylon and the Cape of Good Hope, while these Governors and some of the Councillors at those settlements were *qualitate qua* extraordinary members of the Council at Batavia. The legislative, administrative, and judicial powers of the Governor-General in Council at Batavia were carried by these extraordinary members to their own settlements, and applied to the needs of their respective districts subject to the higher power of the Council at Batavia and the Council of XVII at home [2].

Free use was made of these powers. The ordinances (*plakaten* they were named, after the *plakaten* issued by the authorities in the Netherlands), issued not only at Batavia but also at the settlements outside Java, grew enormously in number without much cohesion or careful observation of continuity. To reduce this chaos to order, as far as the Ordinances issued at Batavia after 1619 were concerned, Joan. Maetsuycker—afterwards Governor-General—was ordered to make a compilation of these ordinances. This compilation, arranged in systematic order, and so far as necessary amended and brought up to date, was promulgated as a Code by resolution of Governor-General van Diemen in Council dated July 1, 1642, and sanctioned by the Council of XVII and the States-General in 1650. It was called the 'Ordinances and Statutes of Batavia' (*Ordonnantien en Statuten van Batavia*).

The Statutes were taken from the *plakaten* and ordinances of the Governor-General in Council, with additions and amendments, and with extracts from the 'common law of the fatherland' and of the 'written Imperial laws' which were deemed suitable for the colonies.

As to the law which should be administered in these colonies the last clause provided as follows, viz.:—

[1] Private Instructions of March 1, 1613, to Governor-General Reynst and his Council, afterwards incorporated in the Instructions of 1617 and forming the subject of many other Instructions and Ordinances of later date.

[2] Instructions of November 3, 1617, Art. 80.

'Further it has been generally provided that on all points on which in these Statutes no special ordinance has been made there shall be observed and maintained the laws, statutes and customs of the United Netherlands; and as these are liable sometimes to fail also, then the written Imperial laws shall be used and observed in so far as they are in accordance with, and practical in view of, the condition of these countries.'

These Statutes had the force of law only within the district of Batavia as it existed in the year 1650. But in the last article it was provided:—

'that all Vice-Governors, Presidents, Justiciaries and Judges of the far-off countries, towns and places situated under the sovereignty of the State of the Netherlands in these countries, shall be bound to regulate themselves according to this book of ordinances as far as the constitution of such countries, towns and places shall admit and allow.'

In all settlements of the East India Company they were promulgated, and used and followed in the Courts. The Statutes of Batavia may be said to have formed a code for the whole of the dominions of the East India Company.

They were adopted in Ceylon by resolution of the Governor in Council dated March 3, 1666.

In the Cape of Good Hope they were called the 'Statutes of India,' and adopted by resolution of the Governor in Council on February 12, 1715, and promulgated three days later [1].

These Statutes were revised, amplified, and brought up to date in 1764. The new compilation consisted of a collection of all laws, ordinances, *plakaten* and regulations, alphabetically arranged, which were in force on August 31, 1764. It was sanctioned and adopted by Governor-General van der Parra and his Council on September 4, 1766, and was distributed among the different Governments outside Java.

In the preamble to these new Statutes it was stated that they should not only be in force at Batavia, but were also intended

'for the enlightenment and direction of all the judges and judicial officers at all the settlements of the Netherlands Indies outside Java, in so far as they shall be applicable there and the condition of those places and our authority there shall allow, as we desire that the said new local code to that extent shall be considered in force everywhere.'

The new Statutes of Batavia were forwarded to the Directors in Holland on October 21, 1766, but for some unknown reason they

[1] Burge, Colonial and Foreign Law, new edition, vol. i, p. 115. J. de V. Roos in C. L. J. xiv, 1897, p. 6 sq.

never received their sanction. They were, however, used and followed by the Courts of Justice in the Netherlands Indies for nearly a century.

For the West Indies a West India Company was incorporated in 1621 with a charter similar to that of the East India Company. This Company acquired as its possessions Essequibo, the island of Curaçao, a settlement on the Pomeroon and Demerara, besides, for a short period, some settlements in Brazil and on the West Coast of Africa (San Paolo de Loando).

The other West India settlements of the Dutch—Suriname and Berbice—remained separate colonies and never belonged to the West India Company.

For these West India dominions similar orders to those of the East India Company were made regarding the law to be administered there. The first order for the West India Company sanctioned by the States-General was dated October 13, 1629, and provided as follows:—

Art. 59: 'In matters of marriage, rights between husband and wife, in intestate successions and the drafting of wills, and all that is connected therewith, there shall have force of law over all countries, towns and peoples belonging to the dominions of the States-General and the West India Company, and everywhere be observed as law, the political ordinance issued by the States of Holland in the year 1582 (*sic*), as its provisions are best known, can be easily used as the common custom of South Holland and Zeelandt, and will introduce the least obscurity and change.'

Art. 60: 'All conveyances, as well as bonds or mortgage deeds, general or special, of houses, lands and grounds, or *erven*, to grant proprietary rights or real rights, shall be passed before the said three members of the committee of civil justice, and the letters to be made thereof shall have to be sealed by them, and thereupon be registered in a register to be kept by the assessor, also in conformity with what is customary in the United Provinces.'

Art. 61: 'In other matters of diverse contracts and transactions the ordinary *beschreven Rechten* shall be followed.'

One hundred and fifty years later (October 4, 1774) resolutions were passed by the States-General containing provisions regarding the law which should prevail in Demerara and Essequibo, the colony of Demerara having been founded in 1750.

III.

What law was prescribed by all these Ordinances? or rather which was the order in which the different laws were to be applied?

The local Statute law and local customs were to be applied in the first instance; when these proved insufficient, then the laws and

customs of the United Provinces, and finally, where these failed, the Roman law. The colonies were founded at the commencement of the fourth period of legal development in the Netherlands, soon after the Republic of the United Provinces had been established. Their development took place contemporaneously with the growth of the law in the Republic, and they adopted the same order as was followed in the home country. With this difference, however, that while in each of the Seven Provinces the common law of that Province only prevailed, in the colonies there were prescribed the laws and customs which were observed in the United Provinces generally.

Is it a matter for wonder that the Statutes of Batavia, especially those of 1766, were readily received and universally used as a guide? Or, that in the Cape of Good Hope a *Plakaat* was issued providing that 'the common law should be the law of Holland and West Friesland, in so far as those laws were adaptable to the circumstances of South Africa and were varied by local enactment, and where those laws remained silent, Roman law, as obtaining in the United Netherlands, must be followed'[1]?

What position did Roman law take? It was mentioned last in the list, but did not keep that place. To know the local laws and customs of each of the United Provinces was difficult enough in those Provinces themselves. Yet, there every community could observe its own laws and customs within its own boundaries. But in the Indies, where within the same boundaries persons were living who belonged to so many different Provinces (or nationalities as the jurists of those days used to call them) the difficulty was enhanced, first to ascertain the local customs and secondly to apply them. For instance, the law of intestate succession which differed in different Provinces, and as to which the maxim applied that every one carried with him the laws of his birthplace, led to special legislation at the urgent request of the Government of both Indies, East and West.

It is improbable that the Courts in the Indies, except the more important ones, were provided with a printed collection of the Statutes and customs of the Netherlands, or that the Judges in the Colonies—mostly trained in the mother-country and sent out by the Council of XVII—would interpret the laws otherwise than their colleagues at home.

Among the India records we do not find any collection of decisions, and it is difficult to say with accuracy how the judges

[1] Mr. J. de V. Roos in S. A. L. J. xxiii, 1906, p. 244. Unfortunately the author in his interesting article does nowhere give his references nor the respective dates of the *plakaten*.

were guided in their administration of the law. The law books, which from time to time were published in the Netherlands, no doubt found their way to the Indies, and it may be surmised that, as soon as the Statutes of Batavia and the local laws and customs were exhausted, reference was made to the handbooks of Grotius, van Leeuwen, Voet, Groenewegen, van der Linden and van der Keessel, and the law administered accordingly.

Thus the local law of the Netherlands—as far as it was not referred to by writers on Roman Dutch law—would be ignored. In the Dutch East and West Indies the same method of legal application and interpretation would be followed as in the Low Countries, viz. to apply first the local Statutes and customs and subsidiarily the Roman law, as explained by the learned jurists at home.

The disappearance of the East India Company and the change of rulers in the Indies at the beginning of the nineteenth century did not create an immediate change in the administration of justice. Prudent as colonists, the British changed the Government, but left the local institutions, local laws and customs untouched. In all the Dutch possessions and colonies which became British the Roman Dutch law remained the common law of the country.

It was only gradually that a change took place. In Ceylon and the West Indies the Dutch language soon ceased to be spoken. Local laws were published in English, and as these accumulated the Statutes of India and the *plakaten* fell into oblivion, though they were not abolished, and have been referred to even in modern times[1]. The result was that the knowledge of Roman Dutch law was restricted to the knowledge of the works of the famous jurists who founded the Dutch school of civilians: as to Ceylon, the laws and customs of the Province of Holland; as to the West Indies, those of Holland and Zeeland.

Even this knowledge has greatly suffered, partly through the abolition of Roman Dutch principles by subsequent enactments, partly through the actions of the Courts.

In the words of my friend, Professor R. W. Lee:—

'Here (that is in Ceylon) it has been mangled by the legislature, and administered in great measure by judges ignorant and sometimes frankly contemptuous of its principles. And yet it lives. The local Bar is vigilant and active. The Bench has been adorned by at least one profound civilian. There are textbooks. There are law reports, almost continuous since 1821. In British Guiana these signs of activity have been absent. There are no textbooks. There are no written records of judgments of earlier date than

[1] *Dona Clara* v. *Dona Maria*, Ramanathan's Ceylon Reports, 1820–1833, p. 33.

1856. There are no reports, the series initiated in 1890 having been discontinued after four years' life. Upon a general view of the state of the Roman Dutch law in this colony it may be said that, except in the sphere of property and intestate succession, not very much of it remains. What of it the Courts had spared, the Legislature has quite lately set itself to destroy.'

On the same subject Mr. Berwick, one of the greatest exponents of Roman Dutch law, wrote as follows:—

'It is only natural, too, that English-bred judges, trained up only in the knowledge of a system of jurisprudence so different from what they have often been sent out to the colonies to administer, should be in little sympathy with the latter, and too prone to fall back on what they already know without effort of memory or research, and which seems to them, from habit and education, the only natural solution of almost every question that arises, until a lengthened experience (and a costly one to the integrity of the law) and a study forced upon them have—as in notable cases within my own knowledge—widened their views as well as their knowledge, shaken their creed that the English Common Law is the perfection of human wisdom, and have gained their unqualified admiration, not to say enthusiasm, for the modern Civil Law.'

IV.

In South Africa the development has been somewhat otherwise. There the Dutch language never ceased to be the language of the country. The Cape had been a colony in the true sense of the word. It did not rely entirely for its colonists on the servants of the East India Company. At the time of the British occupation in 1806 there was a large Dutch farmer population living under a system of law to which they had become accustomed and with which they had grown up. Yet, here too, the *plakaten* and 'Statutes of India' fell into oblivion and were not resorted to when a search for precedents had to be made in the course of a lawsuit. It was decided in *Seaville* v. *Colley* that the law introduced into South Africa was that which was in existence in the Netherlands in 1806, but nothing was said as to which laws were actually in existence in the Cape Colony at that time. Yet those which were in existence were the result of a continuous and gradual legal development in the colonies themselves.

The difficulty consists in finding what the laws of the Netherlands were in the year 1806. It would be best perhaps to consult the attempts at codification of that very law made in Holland in the years 1816 and 1820. But those draft codes have—I am afraid—never become known in any of the South African Colonies.

It is not a matter of surprise that the lawyers in South Africa sought to solve the difficulty by consulting, in addition to the

Statute law of the Dutch Provinces (as far as it was applicable), the works of the Roman Dutch jurists. These not only remained the great sources from which successive generations drew their knowledge of Roman Dutch law, but to three of them legislative sanction was given by the Governments of the former Republics.

These circumstances have had a peculiar effect on the law as it exists at the present day in the South African colonies and upon its interpretation. Inroads have been made into Roman Dutch law by the legislation of the nineteenth century which partly introduced changes on English models, partly superseded the law of the colony by English law, as for example the law of evidence, mercantile and criminal law, the law of shipping and of insurance, bills of lading, bills of exchange and other negotiable instruments.

What the legislature left untouched—and this embraces the law of persons, the law of things, and the greater part of the law of inheritance and obligations, subjects which generally form the contents of the Civil Code in countries where the law is codified—has developed on the same lines as it originally did in the Dutch Republic. Custom has retained its creative force and has moulded the common law according to the changes in the circumstances and habits of the population. Local legislation has followed this development, and the Courts have recognized it in their decisions.

In interpreting the law, the judges have not stopped at the Roman Dutch jurists, nor taken their works and decisions as conclusive. They have, under the guidance of the old jurists, gone back to the same source from which these derived their opinions and arguments, viz. to the law of the Roman Empire. Here this tendency should not stop. In order to understand the Roman Dutch law as it prevails in the British colonies, and in order to interpret it properly, not only Roman law principles should be traced from their origin, but historical researches into all the institutions which form part of the Roman Dutch law should be made.

Fortunately the Colonies have for the last sixty years possessed a judicature which, far from fostering a contempt for the Roman Dutch law which has thus, historically, become the law of their country, has at the instance of jurists like O'Connor, de Villiers, Kotze, and Rose Innes nursed and developed it into a new, a modern Roman Dutch law.

Where the circumstances are so similar to those of the seventeenth and eighteenth centuries, modern Roman Dutch law may have as great a future as the Roman Dutch law which grew up in the Dutch Republic.

W. R. Bisschop.

THE LEGAL PROFESSION IN THE FOURTEENTH AND FIFTEENTH CENTURIES. II.

LINCOLN'S INN[1]. The earliest authentic records of this Society—the Black Books—begin in 1422. Their varied contents describe the life of the Society; but they tell us nothing of its origin. It is a settled Society when they begin with a fixed constitution and settled traditions. The Inn and the greater part of the site belonged originally to the see of Chichester. It was leased to the Society in 1422 at a rent of ten marks. In 1537 Bishop Sampson sold the property to William and Eustace Sulyard, from whom it descended to Edward Sulyard. He sold the property to the Society in 1580 for £520. This being the history of the property, it is difficult to account for the name 'Lincoln's Inn,' and the fact that for two centuries and a half the Society used the arms of the earls of Lincoln. Mr. Baildon's theory[2] is that the Earl of Lincoln was the founder or patron of the Society 'in another place'; that this 'other place' was Thavy's Inn, situated opposite to the Earl of Lincoln's inn, and, as we know, occupied by the apprentices as early as 1348[3]; that the premises growing too small the Society moved first to Furnivall's Inn[4], and then to the Inn of the Bishop of Chichester, keeping however the name of its early founder or patron. This theory would no doubt account for the name of the Society, and for its connexion with these two Inns of Chancery. It cannot at present be said to be proved[5]. Mr. Turner has recently made another conjecture as to the origin of the name[6]. It appears that in 1380 the Abbott of Malmesbury sold a property lying on the south side of Holborn, east of Staple Inn, which is described as 'totum hospicium nostrum vocatum Lyncolnesynne.' It appears

[1] Black Books, i, Introd.; Registers, i, Introd.; Dugdale, Orig. Jud., c. lxiv.

[2] Black Books, iv. 263–297.

[3] Thavy in his will, cited Dugdale, Orig. Jud., c. lxvi, among other things devised, 'Totum illud Hospicium in quo Apprenticii ad Legem habitare solebant.'

[4] Dugdale, Orig. Jud., c. lxv.

[5] See paper by Mr. Turner in which he maintains that the older view, that Lincoln's Inn was originally the residence of the earls of Lincoln, is not disproved. Henry Lacy, Earl of Lincoln, purchased a house in another part of Holborn in 1286; it does not follow that either he or his ancestor was not a predecessor in title of the Bishop of Chichester.

[6] The Athenaeum, Sept. 22, 1906, 335, 'Thomas of Lincoln the serjeant was a likely person to have gathered round him a body of apprentices at law such as those who formerly inhabited, and those whose successors still occupy the present Lincoln's Inn. . . . Thomas of Lincoln may on selling his Inn to the Abbott of Malmesbury have taken up his residence at the Lincoln's Inn of to-day, which then belonged to the Bishop of Chichester, bringing there a body of apprentices who had lived with him in his old Inn.'

also that the name of this property was derived from one Thomas of Lincoln, a legal practitioner of the reign of Edward III. Mr. Turner thinks it possible that this Thomas may have gathered round him a school of apprentices; that when this school grew it may have removed to the house of the Bishop of Chichester; and that there it developed into the Lincoln's Inn of the time of Fortescue. Though as yet much of this theory is conjectural it provides us with an account, both of the origin of the Inn and an explanation of its name, which is by no means improbable.

Gray's Inn. 'That this House,' says Dugdale, 'had its denomination from the Lord Grays of Wilton, whose habitation it anciently was, there are none I presume that doubt[1].' The oldest records which we possess begin with the Pension Book of 1569; but there is an older volume, to which Dugdale had access, which is now lost. The exact period, therefore, when the apprentices of the law became tenants of the Inn is uncertain. Probably the date was somewhere about 1370[2]. It is clear from the Paston Letters that the Society was the tenant of the Inn in 1454[3]. In 1456 Reginald de Gray granted the property to Thomas Bryan, a member of the inn, and afterwards serjeant and C. J. of the King's Bench, and others in fee; and by deed of release Thomas Bryan became the sole owner. In 1493 it was transferred to Sir J. Gray of Wilton, R. Brudenall, serjeant-at-law, and others. In 1506 it passed to Hugh Denys and others; and in 1516 it was conveyed by them to Shene Priory. From 1516 to 1539 the Priory was the landlord of the Society. At the dissolution of the monasteries the property passed to the king, by whom it was granted in fee farm to the Society. Under an arrangement made in 1315 by John de Gray the convent of St. Bartholomew paid the Society £7 13*s.* 4*d.* for the provision of a chaplain; and this obligation passed to the king on the dissolution of the monasteries; on the other hand, the Society owed the king £6 13*s.* 4*d.* as successor in title to the convent of Shene. 'The Court of Augmentations balanced the debit and credit sides of the account by deducting a pound a year from the king's debt[4].' It is probable that Staple Inn and Barnard's Inn were attached to Gray's Inn in the middle of the fifteenth century[5].

[1] Orig. Jud., c. lxvii; Pension Book, xv, xxviii.

[2] In 1589 Yelverton speaks of Gray's Inn as founded two hundred years ago at least, and he had access to MSS. now lost. There is a list of Benchers and Readers compiled by one Segar, the butler of Gray's Inn, in Charles II's reign, which takes the date back to 1355. The authenticity of this list is denied by Foss (Judges, iv. 273–278) and by Pulling, op. cit., 153 sqq.; Mr. Fletcher thinks that it is not wholly untrustworthy, as it is confirmed in some of its details by the Paston Letters, and by some published accounts of the churchwardens of St. Andrews of that date, Pension Book, xxii, n. 1.

[3] i. 297, Billing refers to himself as a 'felaw in Gray's In.'

[4] Pension Book, xxviii.

[5] Dugdale, Orig. Jud., cc. lxviii, lxix.

The Temple. The older records of the Temple, like the older records of the other Inns, have disappeared. The registers of the Inner Temple begin in 1505, and those of the Middle Temple in 1501, but they contain references to older records [1]. Though, as we shall see, we have little certain information as to the origin of the tenancy of the Temple by the lawyers, the history of the property is quite clear. On the dissolution of the Order of the Templars the property passed to the king, who granted it to Thomas, Earl of Lancaster. After his rebellion it passed successively to the Earl of Pembroke and Hugh Despenser. On the latter's attainder it passed once more to the crown. In consequence of a decree made at the Council of Vienna (1324), the lands of the Templars passed to the Hospitallers; and Edward III granted the Temple to this body. That Order was dissolved in 1539; and in 1609 the crown granted the property to the societies of the Inner and Middle Temple at a rent of £10 each. The earliest mention of the tenancy of the Temple by the lawyers is in 1347 [2], at which date the Hospitallers let it to the apprentices of the law [3]. According to a MS. of Charles I's reign, the writer of which had access to documents which are now lost, these apprentices came from Thavy's Inn [4]. Tradition ascribes the separation of these apprentices into the two societies of the Inner and Middle Temple to the beginning of Henry VI's reign [5]. This is borne out by the evidence of the Chroniclers [6], of Chaucer [6], and of the Paston Letters [7]. Probably the MS. already referred to gives a substantially true account of the division.

Since 1347, says the writer [8], the 'professors and students of the common law have there resided, who in tract of time converted and regulated the same first into one Inn of Court and afterwards, *viz.* in the reign of Henry VI, divided themselves into those two Societies or Inns of Court, *viz.* the Inner and Middle Temple. That

[1] Calendar of the Inner Temple Records, i, ix–xi; Middle Temple Records, i. 1, the first entry tells us that the late Treasurer handed to his successor 'The Book of the Constitution of the same place with the Rolls.'

[2] Mr. Hutchinson (Minutes of Parliament of the Middle Temple, i. (7) (8)) believes that there was a settlement of lawyers in the Temple before it came to the Hospitallers, and while it was owned by the Earl of Lancaster (1315–1322); he thinks that there was a later migration from Thavy's Inn; and that these two sets of lawyers may have formed the Inner and Middle Temples. This theory, however, seems to conflict with the Inner Temple records; and the confusion of boundaries in later days, below, p. 175, seems to point to original unity.

[3] Dugdale, Orig. Jud., c. lvii.

[4] Calendar, Inner Temple, i, xvii.

[5] Ibid., xiii.

[6] See L.Q.R. xxiii, 458, n. 1 and 2.

[7] The evidence from these letters is stated at length in the Inner Temple Calendar, i, xiv–xvii; it may be summed up as follows:—in 1426 there is a reference to the 'ostel du Temple bar'; in 1440 to 'your college the Inner Temple'; in 1443 to 'the Inner Temple'; in 1445 to the 'Inner In in the Temple'; in 1449 to the 'Inner Temple'; in 1451 the 'Mydill Inne' and the 'Inner Inne' are both mentioned. It is noted in the Calendar, i, xvi, that in a folio not printed (44^d) of the Black Books of Lincoln's Inn the Middle Temple is referred to in 1442; cp. also in Y. B. 3 Ed. IV, Mich. pl. 7, in which an account is given of a call of serjeants.

[8] Cited Inner Temple Calendar, i, xvii, xviii.

they were at first but one is apparent by all the records of that time, which make no [*sic*] mention only of the Temple in the singular number, without any addition or distinction.'

At that time the lawyers

'were so multiplied and grew into soe great a bulke as could not conveniently be regulated in one Society, nor indeed was the old hall capable of containing so great a number. Whereupon they were forced to divide themselves. A new hall was then erected which is now the Junior (Middle) Temple Hall. Whereunto divers of those who before took their repast and diet in the old hall resorted, and in process of time became a distinct and divided Society.'

Perhaps, as Mr. Inderwick conjectures, the damage done by Wat Tyler suggested a convenient occasion for rebuilding and division. The division, however, was not thoroughly carried out. The two Temples still have their common church; and in 1630 it was stated in the proceedings in a Chancery suit between the two Societies that 'the church, the buildings, lodgings, courts, ways, lanes, belonging to the Inner and Middle Temples are so intermixed that they can hardly be distinguished the one from the other[1].' There was no formal deed of partition till 1732.

We cannot here go into the details of the separate constitution of these Inns. It will be sufficient to say that the governing body was then as it is now the Benchers[2], who possessed powers of education, discipline, and government over the members of the Inns very similar to those possessed by the fellows of an Oxford or Cambridge college[3]. The Benchers were presided over by a member or members of the governing body who were annually elected. Other annually elected members managed the finances of the Society; while the Readers, assisted by the Benchers, were, as we shall see, responsible for the education of the members. In addition there was a staff of paid servants, such as the butler, who, at Lincoln's Inn, did most of the clerical work and assisted in maintaining order, the steward, the cook, the manciple, the porter, and the laundresses[4]. Here we are chiefly concerned with the legal education given by the Inns of Court, and the effect which that education had upon forming the various grades of the legal profession.

The most authentic account of the system pursued is to be found

[1] Calendar, Inner Temple, ii, App. viii.

[2] They met in a Council at Lincoln's Inn, in Parliaments in the Inner and Middle Temple, in a Pension at Gray's Inn.

[3] See e.g. Black Books, i. viii, ix; Inner Temple Calendar, i. xli, 46; Pension Book, xli, 78; cp. Select Cases in the Star Chamber (Seld. Soc.), cx. [Our readers beyond seas must not assume that the Inns of Court still exercise powers aptly so described.—ED.]

[4] Black Books, i. xiv-xxiii; Inner Temple Calendar, i. xxxi, xxxii.

in a statement made by Thomas Denton, Nicolas Bacon, and Robert Cary to Henry VIII upon this subject[1]. It represents the grades of membership and the rules of study as well settled; and no doubt the information contained in it can be taken as applicable to our period. This statement deals with (1) the grades of membership within the Inns, (2) the periods of study, and (3) the mode of education.

(1) The Benchers and Readers are those who have publicly lectured in the Inn. As we have seen, they rule the Society; and at their head is the Treasurer or Pensioner. It is from the Readers that the serjeants-at-law are usually appointed. Below them come the Utter-Barristers. They are

'such that for their learning and continuance are called by the said Readers to plead and argue in the said house doubtful cases and questions which amongst them are called motes, at certain times propounded and brought in before the said Benchers or Readers; and they are called utter-barresters for that they, when they argue the said motes, sit uttermost on the forms, which they call the Barr[2]; and this degree is the chiefest degree for learners in the house next the Benchers; for of these be chosen and made the Readers of all the Inns of Chancery, and also of the most ancient of these is one elected yearly to read amongst them, who, after his reading, is called a Bencher or Reader. All the residue of learners are called Inner-Barresters, which are the youngest men, that for lack of learning and continuance are not able to argue and reason in these motes; nevertheless whensoever any of the said motes be brought in before any of the said Benchers, then two of the said Inner-Barresters sitting on the said forme with the Utter-Barresters, doe for their exercises recite by heart the pleading of the said mote case in Law French, the one taking the part of plaintiff, and the other the part of the defendant[3].'

These were the three chief classes of members of the Inns; but they were not all the members. We can see from Fortescue's description, and from the Paston Letters, that many joined the Inns of Court or Chancery in order to acquire some knowledge of law to be used in their own business without any thought of becoming practising lawyers. It was a wise step for any to take who had property to protect. 'Thynkk onis of the daie of youre faddis counseyle to lerne the lawe,' wrote Agnes Paston to her son Edmund at

[1] Printed by Waterhous, Fortescue Illustratus, 543-549.

[2] For another explanation of the terms 'Utter' and 'Inner' Bar see Black Books of Lincoln's Inn, i. x.

[3] The name 'barrister-at-law' does not become a usual name till the sixteenth century, see L. Q. R. xxi. 252, 253; we have an early use of the term in the Black Books of Lincoln's Inn, i. 264. Even now 'barrister-at-law' is a popular term to mean an utter-barrister, L. Q. R. xxi. 253; the term 'inner barrister' has long been obsolete.

'Clyffordis Inn' in 1445, 'for he seyd manie tymis that ho so ever schuld dwelle at Paston, schulde have nede to conne defende hymselfe[1].' Moreover it is clear that at this period attornies at law were rapidly becoming a distinct class. The old distinction between the attorney and the pleader was still preserved[2]; unprofessional attornies were still legally possible[3]; but there are many evidences that attornies for the purposes of legal business were recognized officers of the court and under the supervision of the judges[4]. As such they were allowed to plead their clients' cases in court[5], and to become members of the Inns. They may perhaps have been more numerous in the Inns of Chancery than the Inns of Court; but they might clearly be members of either[6]. They were not yet confined to the Inns of Chancery. In fact there was as yet no clear division in these respects between the two branches of the profession. Attornies and junior apprentices were classed together at this period, as in the reign of Edward I[7]. As the old legal distinction between the office of an attorney and the office of a pleader tended to grow more faint with the enlarged powers which litigants had of appointing attornies, and with the rise of professional attornies, it might well have happened that the distinction would have been obliterated. But in the following period the distinction was revived, and given its modern significance, mainly by the action of the Inns of Court and the judges in first discouraging and then excluding attornies[8]. The result of this step was to deny the attorney the right to plead in court for his client, because, as we have said, it is only the call to the bar by the Inn which could confer this right. Thus the separation of the profession into two branches, though it has an ancient origin, has been perpetuated by an artificial rule; and, the ancient reasons for it having been lost sight of, it has

[1] i. 58, no. 46.

[2] P. and M., i. 191, 192; Y. B. 12, 13 Ed. III (R. S.), 102, 274.

[3] Y. B. 18 Ed. III (R. S.), xxxviii, 'There is nothing to show that a party could not nominate any one whom he might please to act for him. He might even nominate his wife.'

[4] See e.g. Y. B. B. 11, 12 Ed. III (R. S.), 586; 17, 18 Ed. III (R. S.), 138–140; R. P. iii. 642 (11 Hen. IV, no. 63); ibid. 666 (13 Hen. IV, no. 49); iv. 80 (3 Hen. V, no. 34); 4 Hen. IV, c. 18; 33 Hen. VI, c. 8.

[5] See e.g. Y. B. B. 11, 12 Ed. III (R. S.), 138, 206, 436; 12, 13 Ed. III (R. S.), 2, 214, 304; 13, 14 Ed. III (R. S.), 74.

[6] It is not until the sixteenth century that they were excluded from the Inns of Court, and then in terms which imply that they had formerly been members; thus in 1556 the Council of Lincoln's Inn ordered that, '*From henceforth* no man that shall exercise th' office of Attornieship shalbe admitted into the feloship of this Howse wi'out the consent of vi of the Benche,' Black Books, i. 315; in 1557 the judges made a similar order that Attornies should be excluded from the Inns of Court *from henceforth*, Dugdale, Orig. Jud., 310; Middle Temple Records, 111.

[7] R. P. iii. 58 (2 Rich. II), the legal profession is assessed as follows:—serjeants and great apprentices, 40*s.*; other apprentices, 20*s.*; apprentices of less estate and attornies, 6*s.* 8*d.*

[8] See L. Q. R. xxii. 379, 380 for a suggested explanation of this step taken by the judges.

appeared to many to be a meaningless division. There was, perhaps, one survival which may date from this period when apprentices, attornies, and clerks of many sorts[1] could all be members of the Inns. We know from the Rolls of Parliament that the officers of the courts sometimes acted as attornies[2]. Perhaps some of them acted also as pleaders. If these officials were members of the Inns and resided there we may find an explanation of the fact that many of the offices of the courts were situated at these Inns[3].

(2) The periods into what we may call 'the academic year' were divided were Learning Vacations in Lent and summer; Term time; and Dead Vacation. Of these periods the Learning Vacations were the most important.

(3) The mode of education may be summed up in two words, lectures and argument. For the learning vacations the Benchers elected from among the senior Utter-Barristers a summer Reader. The same person often read during both the summer and Lent vacations. The person selected was given half a year's notice to prepare his lectures.

'Then the first day after Vacation, about 8 of the clock, he that is so chosen to read openly in the Hall . . . shall reade some one suche Act or Statute as shall please him to ground his whole reading on for all that Vacation, and that done, doth declare such inconveniences and mischiefs as were unprovided for . . . and then reciteth certain doubts and questions which he hath devised, that may grow upon the said statute, and declareth his judgement therein. That done, one of the younger Utter-Barresters rehearseth one question propounded by the Reader, and doth by way of argument labour to prove the Reader's opinion to be against the law, and after him the rest of the Utter-Barresters and Readers one after another in their ancienties, doe declare their opinions and judgements in the same; and then the Reader who did put the case endeavoureth himself to confute objections laid against him, and to confirm his own opinion, after whom the judges and serjeants, if any be present, declare their opinions, and after they have done, the youngest Utter-Barrester again rehearseth another case, which is ordered as the other was. Thus the reading ends for that day: and this manner of reading and disputations continue daily two hours or thereabouts.'

These were the solemn readings; but work was not over for the day. After dinner cases put at the Reader's table were argued throughout the Hall; and every night after supper, 'and every

[1] Black Books of Lincoln's Inn, i. xiii.

[2] R. P. iii. 306 (16 Rich. II, no. 28). There is a complaint that the clerks of the King's Bench, Common Bench, and the Assizes act as attornies for the parties, and falsify the rolls in the interests of their clients.

[3] Holdsworth, H. E. L., i. 403; Inner Temple Calendar, i. xxviii, xxix.

fasting day immediately after six of the clock,' the Reader and the Benchers discussed cases put by one of the Utter-Barristers. That done they held a mote. The Benchers acted as judges, and two Inner-Barristers and two Utter-Barristers acted as counsel. In the Inns of Chancery the Reader was an Utter-Barrister of the Inn of Court to which the Inn of Chancery was annexed. There a very similar procedure was followed[1].

In term time cases were argued after dinner, and motes were held after supper; and even in the Dead Vacation the same course was followed, the Utter-Barristers then taking the place of the Benchers[2]. This being the mode of education, we can see how important it was that not only the students, but also the Utter-Barristers and Readers should 'keep their vacations.' Numerous rules were made to ensure this—indeed to have kept so many vacations was, in the case of the students, a condition precedent to a call[3]. Utter-Barristers and Benchers were liable to a fine and other penalties[4].

It is not surprising that law schools conducted after this fashion made 'tough law[5].' The training which they gave was intensely practical; and no doubt it kept the practical, the argumentative, the procedural side of law prominently to the front—perhaps sometimes to the exclusion of legal theory. It produced the men who wrote the Year Books—the men who made the common law a system of case law. At the same time we cannot say that it gave no opportunities for instruction in legal theory. It also produced Littleton and Fortescue. We may conjecture that the students had some opportunities for 'private reading,' perhaps in the chambers of the elder lawyers[6]; and to those whose minds are prepared by such reading, suggestions thrown out in argument, and the quick play of mind upon mind, will often give hints as to the existence of difficult problems, and clues to their correct solution. Moreover we may remember that this mode of instruction, if it began by making men pleaders, and continued by making them advocates

[1] In Y. B. 37 Hen. VI, Hil., pl. 4, there is an allusion to the moots in the Inns of Chancery, 'Ceo este la forme de pleading en Inns de Chancery; mes la forme n'est bon.'

[2] Cp. Black Books of Lincoln's Inn, i. ix-xi, xxiv-xxvii.

[3] Ibid. i. 12, 41-43.

[4] Ibid. i. 263, there is an order of 1563 that 'No Utter Barrester shalbe allowed to have any boyer pot, or clerke to sytt in comens, onless the same Utter Barrester gyve his diligent attendauns att all lernyngs, and especially yn the lernyng vacacyons, aswell within this House as att Chancery mootes.'

[5] Maitland, English Law and the Renaissance, 27, 28, 'Now it would, so I think, be difficult to conceive any scheme better suited to harden and toughen a traditional body of law than one which, while books were still uncommon, compelled every lawyer to take part in legal education, and every distinguished lawyer to read public lectures'; see ibid. 89, 90 for Sir Thomas Smith's appreciation of the qualities of the 'Londinenses Jurisconsulti.'

[6] In Y. B. 11 Ed. IV, Trin., pl. 4, Genney speaks of 'Mon master Cheine.'

and keen debaters, ended by making them judges. The Benchers in the learning vacations and in term time were the judges in the motes; and the Utter-Barristers in the Inns of Chancery, and in the Inns of Court in the dead vacations, played the same part. Thus the education provided by the Inns was a constant rehearsal and a preparation for the life of advocate and judge. All were learners in their various grades. A call to the bar was but an inception. The Utter-Barrister must still learn of the Readers and Benchers as well as assist to teach by the part he took in readings and motes. The learning of the 'ancients' was kept fresh by the queries and the difficulties of the inner bar. Even the Benchers themselves were, as compared with the serjeants and judges, but apprentices in the law [1].

(III) *The Relation of the Inns of Court to the Serjeants and Judges.*

The serjeants and judges were, as we have seen, the rulers of the profession of the law. They formed a guild of their own; and the member of an Inn who became a serjeant ceased to belong to the Inn. On his departure a presentation was made to him, and his former colleagues prayed him always to bear in mind the interests of his old Society; and he in turn thanked the Society, 'gevynge a gret lawde onto the maners of the house wher thorough they have atteynid to ther kownyng and promocyon [2].' Though the Inns were independent societies, they had probably, as we have said [3], gained their powers by the goodwill of the judges; and they still remained liable to obey the reasonable orders issued by the judges, who exercised in later days, and probably from the earliest period, a sort of visitatorial jurisdiction [4]. It is but rarely that we hear of any objection made to these orders [5]; for as a rule they only contained regulations affecting the education, the conduct, the behaviour, and the qualifications of the members of the Inns. They do not interfere with their peculiar customs and their internal economy; and they were sometimes made with the consent of the

[1] Black Books of Lincoln's Inn, i. xxxix, note.

[2] Dugdale, Orig. Jud., cc. xliii-xlvi. The following extract, taken from c. xliii, will give some idea of the common forms of address on such occasions. The occasion was the creation of three serjeants from the Middle Temple in 1504; one of the members of the Inn spoke, praising the serjeants, 'pro suo bono gestu et bona gubernatione, quae fuerunt causa electionis eorum, desiderando eos habere societatem in eorum favorem, &c. . . . Et tunc Thesaurarius deliberat eis xx marcas in auro et argento, inclusas in nova cyroteca; quibus acceptis regratiebantur Societatem, non solum pro pecunia, sed pro aliis beneficiis, ut erudicione legum et legatione eorum ad studendum per bonas regulas ordinatis per Comitivam, quae restrixerunt eis [*corr.* restrinxerunt eos] in juventute ab insolentia ad studendum,' &c.

[3] See L.Q.R. xxiii, 459.

[4] Dugdale, Orig. Jud., c. lxx.

[5] Ibid. 314, 315. We hear sometimes of objections; the Society of Lincoln's Inn promises only a qualified obedience to the orders of the judges issued in 1594; in 1559 the same Society declined to enforce an order of the judges forbidding the wearing of beards, Black Books, i. xxxvi, 328, 329.

Benchers [1]. The judges and serjeants did not forget their old societies, nor did their old societies forget them [2]—indeed they sometimes continued to reside within their walls [3]. They were ready to assist them if appealed to [4]; and they sometimes gave dignity not only to the Reader's feast, but also, in the fifteenth and sixteenth centuries, to his Reading [5].

(IV) *The Legal Profession and the Law.*

The education, the discipline, the whole life of the Inns of Court were collegiate in the best sense of the word. The picture of the conditions of life within their walls drawn by the earliest records is strikingly similar to the modern conditions of collegiate life at Oxford or Cambridge. The technical training which the students received was, as we have said, first-rate, but, as we have seen, these Inns attracted many others besides the men who meant to live by the law, because they gave, as the two older Universities to-day give, a moral and a social as well as an intellectual training.

'Religion and morals,' says Mr. Fletcher [6], 'were cared for as well as learning; and the younger men did not lack the social training which was to be acquired from daily association in an atmosphere of good fellowship and respect for authority with others of their own standing. The members lived to a great extent in community. In the Hall they met for breakfast, dinner or supper, as well as for lectures and disputations. In the chapel they assembled for common prayer and the Holy Communion. At Christmas and sometimes at other seasons they shared both in the labour and the expense of presenting masques and plays in the Inn or at Court.'

Much of the fabric, and many of the possessions of the Inns, are standing proofs of the patriotism of their members. They subscribed to add to or to beautify their buildings [7]. They willingly gave their

[1] Dugdale, Orig. Jud., 316, notices that such assent is given to the orders of 1596.

[2] Black Books, i. 152, 'Nov. 30, 1508. Granted by the Governors and all the Benchers, to Robert Reede, knight, Chief Justice of the Common Bench, for the love that he has for the Inn, that whenever the office of Butler to the Inn shall become vacant, the said Robert shall nominate whom he pleases to the said office.' This is the Sir Robert Reede 'who endowed lectures,' see Maitland, English Law and the Renaissance, 1-3.

[3] e. g. Coke in the Inner Temple.

[4] Inner Temple Records, i. xlv—a dispute as to seniority the object being to escape reading; Black Books, i. 43, 44—the latter entry is an order made by some of the judges and serjeants that the Benchers from their call to the Bench till their first reading shall keep the Autumn and Lent Vacations.

[5] Above, p. 179.

[6] Pension Book, Gray's Inn, xxxii.

[7] See Dugdale, Orig. Jud., 146, as to the building of the kitchen of the Inner Temple in Mary's reign; ibid. 188, as to the building of the Hall of the Middle Temple; Black Books, ii. vi-viii, as to the building of the new chapel at Lincoln's Inn.

services[1]. They remembered their societies by gifts in their lifetime or after their death[2]. Men imbued with this spirit, and highly trained in the theory and practice of the law, afforded the best material from which to select the serjeants and the judges. They came to the practice and the administration of the law with high ideals as to the greatness of their calling, with much of the spirit of the Roman lawyers who defined jurisprudence as 'divinarum atque humanarum rerum notitia, justi atque injusti scientia.' 'The law,' says Fortescue[3], 'is a holy sanction or decree commanding those things that be honest, and forbidding the contraries'; and again, 'Man's lawes are nothing else but certaine rules whereby Justice is perfectly taught.' There will be perhaps some danger that the law thus technically learned will become more and more esoteric; and that appreciation will develop into an uncritical complacency. But this mode of training will tend to preserve the old idea that law is essentially a rule of conduct binding all members of the state, rulers as well as subjects, and will thus maintain in the common law and the common lawyers that boldness in the face of authority which has always been the chief bulwark of our constitutional liberties. And, as in the wider sphere of politics the self-government of the independent local communities trained the nation at large in the duties and responsibilities of citizenship, so, in the narrower sphere of the legal profession, these independent, self-governing Inns of Court trained the legal profession in those high standards of professional honour, which has given to it its undoubted monopoly of the knowledge and the practice of the law. The serjeants were selected, no doubt, by the crown; but they were selected on the advice of the judges. They were sworn to truly serve the king's people; and their monopoly of practice was in the Court of Common Pleas. The cause of legal knowledge was not advanced, when, in later times, the Inns of Court lost their collegiate existence, ceased to educate their members in the law, and retained only the exclusive privilege—gained in the days when they were efficient educational bodies—to admit their members to practise in the Courts. Even in the twentieth century those of us who have at heart the cause of legal education may learn something, our cousins in the New

[1] Dugdale, Orig. Jud., tells us that Plowden acted as Treasurer for the building the Middle Temple Hall.

[2] Black Books, i. 136 (1505), 'John Nethersale, late one of the Society, from the goodwill that he had to the Society, gave and left 40 marks that the Society might build or newly erect the Library within the Inn'; ibid. iii. 453, for Hale's bequest of his books and MSS. to the Library; ibid. iv. 369–374, for the plate presented at different periods to the Inn.

[3] De Laudibus, cc. 3 and 4; cp. Y. B. 24 Ed. III, Pasch. pl. 22, 'La Ley est reason et equitie a faire droit a touts et a saver chescun home de meschief en tant come il puit.'

World have learnt something [1], from the methods pursued by these societies, and by the great guild of the serjeants and the judges, in the fourteenth and fifteenth centuries. The control over the education in, and the practice of, the common law was entrusted to them; and the work they did in completing and developing the system which they had inherited proved them to be no unworthy successors of the great kings and statesmen, of the twelfth and thirteenth centuries. These kings and statesmen checked the disintegrating tendencies of feudalism, and, by so doing, gave us our common law. The legal profession in the fourteenth and fifteenth centuries so strengthened its fabric by the mode in which they practised and taught it, that it was able towards the end of the sixteenth century to take new life, and, in the seventeenth century, to contend successfully with the rival systems of law administered in the Council, the Chancery, and the Admiralty [2].

W. S. HOLDSWORTH.

[1] See L. Q. R. xiv. 416 sqq. for a description of the Moot system as practised at Harvard.

[2] This was for the first time clearly shown by Professor Maitland in his English Law and the Renaissance.

THE KING v. *ALMON.* I.

THE judgment in *Rex* v. *Almon*[1], prepared, but never delivered, by Mr. Justice (afterwards Chief Justice) Wilmot, commanded the respect due to the opinions of a distinguished judge and, partly perhaps for this reason, was accepted without criticism by later judges. The case does not appear from the reports to have been cited by any English judge before 1821, but it was brought into prominence by the commendation of Lord Lyndhurst in *Ex parte Van Sandau* in 1844, and has been referred to with approval in a line of decided cases extending to the present day[2]. A considerable part of the judgment is quoted verbatim in the Report of the Select Committee of the House of Commons in Sir Francis Burdett's case (1810) as to the jurisdiction of the House to commit for a libel on itself, a report which involved an elaborate search for precedents and is partly based on the analogous powers of courts of justice[3].

In a note to *Rex* v. *Almon* it is said that the judgment was not delivered, in consequence of the prosecution being dropped, as supposed, upon the resignation of the Attorney-General. A somewhat different account is given in Almon's Biographical Anecdotes of Eminent Persons[4]. It appears that in Hilary Term, 1765, a rule nisi was obtained for the attachment of Almon for publishing a libel on the Chief Justice, Lord Mansfield, and the arguments upon it took place in the following term, judgment being reserved. In Trinity term, when the judgment was ready to be delivered, the judges discovered that the rule nisi was entitled 'The King *v.* Wilkes' instead of 'The King *v.* Almon,' and they pressed the defendant's counsel in court to consent to an amendment, but without success. Wilmot J. asked the defendant's counsel, Serjeant Glynn, 'as a gentleman' to consent, to which the Serjeant replied that 'as a man of honour' he could not. The proceeding was therefore abandoned and a new rule nisi obtained, the arguments on which stood over until the next term. Meanwhile the ministry resigned and the new ministers decided to proceed no further in the matter.

[1] 1765, Wilmot's Notes, 243.

[2] See *Taaffe* v. *Downes*, C. P. Ir. (1813) 3 Moo. P. C. 36, n. at pp. 48, 72; *Rex* v. *Clement* (1821) 4 B. & Ald. at p. 233; *Rex* v. *Davison* (ib.) at p. 337; *Rex* v. *Faulkner* (1835) 2 C. M. & R. at p. 530; *Miller* v. *Knox* (1838) 4 Bing. N. C. at pp. 587, 597, 606, 614, 620; *Ex parte Van Sandau* (1844) 1 Phil. at p. 454; *Ex parte Turner* (1844) 3 Mont. D. & D. at p. 542; *Crawford's* case (1849) 13 Q. B. at pp. 627, 631; *Reg.* v. *Lefroy* (1873) L. R. 8 Q. B. at p. 139; *Ex parte Martin* (1879) 4 Q. B. D. at p. 215; *Re Johnson* (1887) 20 Q. B. D. at pp. 72, 75; *Att.-Gen.* v. *Kissane* (1893) 32 L. R. Ir. at pp. 271, 275; *Reg.* v. *Gray* [1900] 2 Q. B. at p. 40; *Rex* v. *Davies* [1906] 1 K. B. at p. 40.

[3] See Appendix E to the Report, which is printed in 8 How. St. Tr. 14.

[4] (1797) vol. i. pp. 241–258; see also Ann. Reg. 1765, pp. 177–9.

Wilmot's Notes of Opinions and Judgments were published in 1802, ten years after the judge's death, by his son, a master in chancery, who, in a preface, apologizes for the imperfections of some of the cases; but in his Memoirs of his father the same son shows that the judgment in *Rex* v. *Almon* 'was prepared for delivery, copied fair, and corrected with the judge's own hand[1],' so that the published report may be taken as representing the judge's deliberate opinions.

The libel upon which the proceedings were taken was contained in a pamphlet in which Lord Mansfield was accused of officiously, arbitrarily, and illegally, making, out of court, an order to amend an information against John Wilkes, and also of an intention to defeat the Habeas Corpus Act by introducing a rule requiring an affidavit before issuing the writ of *habeas corpus* instead of granting it 'of course[2].' The rule to show cause was argued in the King's Bench before Wilmot, Yates, and Aston JJ., the Chief Justice not attending. Sir Fletcher Norton A.-G. and Mr. De Grey S.-G. supported the application for attachment and were opposed by Serjeant Glynn and Mr. Dunning. It was contended for the defendant that the proceeding should have been by information or indictment or that Lord Mansfield should have brought an action of *Scandalum magnatum*—that a libel on the court or a judge in his judicial capacity was not a fit subject for attachment, under which procedure the court must exercise the province of party, judge, evidence, and jury—that here there was no disobedience to a rule of court[3]. The judgment, prepared by Wilmot J. and approved by his brother judges[4], was in favour of granting the attachment, and the substance of the principles it lays down will be found in the following extract (p. 254):

'The power which the Courts in Westminster Hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it (1 Vent. 1) and the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terrae* and within the exception of Magna Charta as the issuing

[1] Memoirs of the Life of Sir John Eardley Wilmot, by John Wilmot, 2nd ed. p. 77.

[2] The pamphlet, entitled 'A Letter on Libels and Warrants,' &c., was attributed to Lord Camden (Almon's Anecdotes, i. 244; and see 30 How. St. Tr. 1274). Part of it is quoted in a note to *Rex* v. *Almon*, at p. 248. For Lord Mansfield's statement of the circumstances under which the order to amend was made, see *Rex* v. *Wilkes* (1770) 4 Burr. at p. 2532.

[3] Wilmot's Memoirs, 77; Almon's Anecdotes, i. 244; Ann. Reg. 1765, 177-9.

[4] It appeared by an indorsement on the transcript of the judgment in Sir Eardley Wilmot's handwriting that the other judges concurred (Wilmot's Memoirs, 79).

any other legal process whatever. I have examined very carefully to see if I could find out any vestiges or traces of its introduction but can find none. It is as ancient as any other part of the common law; there is no priority or posteriority to be discovered about it and therefore (it) cannot be said to invade the common law but to act in an alliance and friendly conjunction with every other provision which the wisdom of our ancestors has established for the general good of society. And though I do not mean to compare and contrast attachments with trials by jury, yet truth compels me to say that the mode of proceeding by attachment stands upon the very same foundation and basis as trials by jury do—immemorial usage and practice; it is a constitutional remedy in particular cases and the judges in those cases are as much bound to give an activity to this part of the law as to any other part of it. Indeed it is admitted that attachments are very properly granted for resistance of process or a contumelious treatment of it or any violence or abuse of the ministers or others employed to execute it. But it is said that the course of justice in those cases is obstructed and the obstruction must be instantly removed; that there is no such necessity in the case of libels upon Courts or judges, which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libelling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does in my opinion become more proper for an attachment than any other cause whatsoever.'

The judgment has been referred to in a modern case as 'a most valuable exposition of the law on the subject[1],' and it was said in a still more recent case that the jurisdiction to punish scurrilous abuse of a judge, as a judge, by summary process, 'is a jurisdiction, the history, purpose, and extent of which are admirably treated of in the opinion of Wilmot C. J., then Wilmot J., in his Opinions and Judgments,' a note to the passage referring to *Rex* v. *Almon*[2]. It is not to be assumed that every judge who has cited the judgment in Almon's case has given his sanction to all that it contains, but in none of the cases in which it has been referred to is there any suggestion of doubt that Mr. Justice Wilmot was correct in his conclusion that the process of attachment was applicable to the case of a libel on the Court[3], and the only unfavourable criticism will be found in the judgment of Fletcher J. in *Taaffe* v. *Downes*[4],

[1] Per Lord Esher M.R., *Reg.* v. *Johnson* (1887) 20 Q. B. D. at p. 72.

[2] Per Lord Russell of Killowen C.J., *Reg.* v. *Gray* [1900] 2 Q. B. at p. 40.

[3] See the cases referred to in note 2 at p. 184, *supra*. In *Miller* v. *Knox* (1838) 4 Bing. N. C. at pp. 606, 620, 44 R. R. 797, 809, Bosanquet and Littledale JJ., not dissenting from Wilmot's judgment, though differing from the majority of the judges in the case before them, thought that attachment did not apply in that particular case.

[4] Decided by the Common Pleas in Ireland in 1813 and reported in a note to 3 Moo. P. C. at p. 36, 50 R. R. 14. The judgment of Fletcher J. is contained in the full report of the case, by John Hatchell, barrister-at-law (Dublin, 1815), referred to in the note in 3 Moo. P. C. at p. 36 and there said to be out of print, and scarce. A copy

a pronouncement remarkable for its great length, for its learning, and for its disrespectful treatment of Chief Justice Wilmot. The following passages are selected from those in which Fletcher J. reflects upon Wilmot's Notes, upon Almon's case in particular, and upon the Chief Justice himself (p. 149):

'Unless then every sentence in this book (Wilmot's Notes) be oracular, I do not know why I am to pin my faith upon this dictum[1] of Chief Justice Wilmot. The book itself rested in undisturbed repose . . . for the twenty-one years of the compiler's life, after his retirement from the bench, and for ten years more after his death. At length the piety of a relative (*Pietate laudatus aut excusatus* is his motto) caused the book to be printed in 1802, from which time it continued unnoticed and unknown till cited by Sir V. Gibbs in the case of *Burdett* v. *Abbot*, in which case too it is observable that neither Lord Ellenborough nor the other judges took any notice of it in pronouncing judgment. It comes before us then unauthenticated by a responsible editor and unadopted, indeed untried, by the profession. The collector, attentive as he latterly was to character and ambitious more than enough in his style, for years of leisure declined to give it to the public. The particular article moreover in which the dictum appears was not a pronounced judgment but merely notes of an opinion intended to have been delivered—notes taken during an argument which was never completed and prepared if at all before the case was ripe for the formation of an opinion. In such an article of such a book is this dictum found that is to decide the serious and important question arising upon these pleadings.'

Mr. Justice Fletcher proceeds to point out that Wilmot was promoted by a cabinet in which Lord Mansfield was all-powerful, and was under his influence and direction on the bench—that the rights of juries and the liberties of the press were for a time prostrated at the foot of Lord Mansfield as Chief Justice, whose character was deeply implicated by the publication of Almon's pamphlet—that Wilmot considered this attack upon his friend as little less than sacrilege, and that therefore his judgment, if one had been delivered, might have been biased—that he (Fletcher J.), when he is referred, not to a pronounced judgment but, to an argument prepared under such influence and in such temper, will not consent to

is in the Inner Temple library. Moore is unable to reproduce the judgment of Fletcher J. on account of its length, and with reason, for it appears to have occupied nearly five hours in the delivery (p. 176 of Hatchell's Report). There is a brief memoir of Fletcher J. in The charge of the Hon. Wm. Fletcher . . . to the grand jury of the county of Wexford . . . 1814, as reported by Mr. Counsellor Hatchell (Brit. Mus.). The case of *Taaffe* v. *Downes*, so far as it relates to the subject of attachment, is referred to below (p. 194).

[1] This refers to the statement (*Rex* v. *Almon*, 269) that the issue of a warrant by a judge of the King's Bench is a judicial act, that being the question in *Taaffe* v. *Downes*. See further as to the latter case, p. 194, *infra*.

be bound by it. Finally (p. 159) the learned judge refers to Wilmot's endeavours to magnify the judicial authority, and his statement (*Rex* v. *Almon*, 270) that the principle of attachments for libels on judges is to keep a blaze of glory round them, and describes this 'declamation' as

'the hasty and warm ebullition of a mind fraught with arbitrary notions, irritated and excited by a severe attack upon his whole Court, especially upon his venerated and adored Chief Justice; and the very reverse of what it is called: a considered, digested, ulterior opinion.'

Mr. Justice Fletcher does not question the correctness of Wilmot's opinion as to the right to punish libels on courts by attachment, and this was not necessary for his purpose in *Taaffe* v. *Downes*.

Lord Norbury C.J., in his judgment in the same case [1], thus refers to Chief Justice Wilmot:

'On the present occasion I cannot humiliate that great man's memory by entering into a laboured vindication of one of the purest judicial characters that ever adorned Westminster Hall. There Wilmot has ever been considered *clarum et venerabile nomen* . . . In the volume of his opinions, so often quoted, there is given a great legacy to learning and the law. But in the history of Sir Eardley Wilmot's virtuous and laborious life he has left what is still more valuable to the profession and to the world,—he has left the most perfect model of a learned, upright, and constitutional judge, which those who succeed him should be zealous to imitate. It never was even insinuated, whilst he lived, that he was a servile adulator or dependent on any superior, or that he was guilty of a mean and vicious solicitude for a paltry popularity.'

In considering the jurisdiction to punish contempts by summary process, certain distinctions between the various kinds of contempt must not be forgotten. The difference between disobedience to the process of the Court by a party to an action and contumelious behaviour to the Court, whether shown by a party or a stranger, is an obvious one. The latter class may be divided into contempts in the face of the Court and contempts committed out of court, and there is a further distinction between contempts committed by parties or by officers of the Court and those committed by strangers. There can be no question that obedience to the King's writ was enforced by attachment from time immemorial, and in later times this remedy was extended to enforce a rule of the Court [2]. The first adoption of the summary jurisdiction upon contumelious behaviour in its different phases has not been clearly traced, but instances can be cited to illustrate the early practice, and it will be the object of the present paper to show

[1] Hatchell's report, p. 216.

[2] Kelyng (Chief Justice, 1665-71) first applied the writ of attachment to enforce an award of arbitration (*Forster* v. *Brunetti* (1696) 1 Salk. 83).

that the jurisdiction in the case of a libel on the Court by a stranger (the offence in Almon's case) was the latest to be established, and that no recorded instance is to be found earlier than the eighteenth century.

On reading the judgment in *Rex* v. *Almon* one is struck by the fewness of authorities cited[1]; if earlier ones are to be found they must be searched for independently, for neither in that nor in subsequent cases is there any reference to earlier authority on the power of a common law court to punish libels on itself by summary process. Taking Wilmot's proposition that 'the issuing of attachments by the supreme courts of justice in Westminster Hall for contempts out of court stands upon the same immemorial usage as supports the whole fabric of the common law,' and confining the question for the present to libels on the Court, which may have indirectly the effect of impeding the course of justice by bringing the administration of the law into disrepute,—what authorities were there when Wilmot wrote for the punishment of such libels by attachment?

In *Re Read and Huggonson and the St. James's Evening Post* (1742, 2 Atk. 469) Lord Hardwicke, in deciding that it was a contempt to libel persons in connexion with a cause in Chancery to which they were parties, referred to 'scandalizing the Court' as one form of contempt, and mentioned the case of Rakes the printer of the Gloucester Journal, committed for a libel on certain Commissioners who were holding a judicial inquiry[2]. Lord Hardwicke does not here refer to the jurisdiction to punish libels summarily as contempts as firmly established, but rather seems to treat the point as

[1] Holroyd J. is under a misapprehension when he says in *Rex* v. *Davison* (1821) 4 B. & Ald. at p. 337, 23 R. R. 302: 'All the cases on this subject with respect to the power of courts of record to fine and imprison for contempt are collected together very ably by Mr. Justice Wilmot with a view to a judicial opinion in *The King* v. *Almon*.' One of the few cases cited by Wilmot is that of *Sparks* v. *Martin* (1669) 1 Vent. 1, in which it was held that the Court of Admiralty, though not a court of record, might punish resistance to process and might fine and imprison for a contempt *in facie*. Wilmot (*Rex* v. *Almon*, 254) cites this case to prove his statement that it is a necessary incident to every court of justice, whether of record or not, to fine and imprison for contempt *in facie*. But there is high authority to show that a court not of record has no power at common law to fine or imprison (see 11 Rep. 43 b, 44 a; 2 Hawk. P. C. Ch. 1, s. 14; Black. Com. iii. 24). The report of *Sparks* v. *Martin* shows that Wyndham and Moreton JJ. were not present when judgment was given, but that the former concurred on the case being put to him afterwards by Kelyng C. J. The last named judge is well known to have stretched the powers of the court beyond due limits; he was severely censured by the House of Commons for intimidating juries (Com. Journ. (1667) ix. 35-37). *Sparks* v. *Martin* seems opposed to *Thomlinson's* case (1605) 12 Rep. 104, which was not referred to by Kelyng.

[2] This case does not seem to have been reported, but the solicitor for one of the parties was committed 'for his ill practice and contempt of this Court in causing the libel to be inserted in the Gloucester Journal' (*Re Ingles* (1740) Sand. Chan. Ord. 552). The case of *Dodd* (1736) Sand. Chan. Ord. 538-42, where a news-collector was committed for a libel on the Court of Chancery appearing in the Daily Post, may also be referred to. It is believed that this is the earliest recorded case of the committal of a stranger by the Court of Chancery for a libel on itself.

a new one. In the absence of earlier authority it would seem that the jurisdiction of the Court of Chancery to commit a stranger for a libel upon itself was of modern growth, but in any case the existence of a jurisdiction in Chancery to commit summarily for contempt, which probably had its origin in the delegation to the Chancellor of the royal prerogative[1], would not be sufficient to prove a similar jurisdiction in the Court of King's Bench, and Mr. Justice Wilmot does not refer to any Chancery cases[2].

Beginning with the latest common law authority which might have been cited in Almon's case, we find that in 1731, on a rule to show cause why an attachment should not be granted against two persons for a libel on the Court of King's Bench, 'the Court said that it was beyond all question that attachments have been granted in these cases, and particularly mentioned Dr. Middleton's case, where it was so done[3].'

The language here used by Lord Raymond C. J. indicates that there was no well established practice. In the case he refers to, a rule nisi for attachment was obtained against one Wiatt for publishing a libel on the King's Bench[4]. The defendant, in moving to discharge the rule, alleged that he had published in ignorance of the libel, and that Dr. Middleton was the author. The next term Dr. Middleton appeared and confessed the authorship. The rule was discharged against the publisher, and Dr. Middleton was com-

[1] See Spence's Equitable Jurisdiction (1846) p. 354, addl. note (2). Cases of contempt on the service of process punished by the Court of Chancery are found at the end of the sixteenth century (see Cary, 131, 137), and the earliest rules for the punishment of contempts on the service of process are those of Lord Bacon (Orders of 1619, No. 77, Sanders, Chan. Ord. 119). In still earlier times there are numerous cases of punishment of contempts of the Court of Chancery by the Star Chamber,—so numerous indeed as to suggest that the exercise of the most part if not the whole of this jurisdiction was originally assigned to the sister Court, in other words, to a branch of the Council distinct from the Chancery (see J. B. W. Chapman's List of proceedings in the Court of Star Chamber preserved in the Public Record Office, vol. i. A.D. 1485–1558, *passim*). In Henry VIII's reign the Star Chamber punished an assault on the plaintiff's servant who had served a Chancery injunction (ib. 221), and in the following reign the same Court entertained proceedings 'for contempt of Chancery writs' (ib. 271). The Star Chamber intervened in Chancery cases of libel down to its last days; in 6 Charles I persons were fined, pilloried, and imprisoned by the Star Chamber for, *inter alia*, presenting a petition to the King alleging that the Lord Keeper had made an unjust decree (*Att.-Gen.* v. *Norton* (1630) Star Chamber Rep., Rushworth Collections, Pt. ii, App. 29); and the same year one Jones was committed and fined by the same Court for a libel on a master in chancery (*Att.-Gen.* v. *Jones* (1630) ib. 31). And as to the exercise of criminal jurisdiction by the Star Chamber in aid of the Court of Chancery, see further Spence's Equitable Jurisdiction, i. 351, 689, 691; Acta Cancellariae, 607, 697, 755.

[2] Atkin's second volume containing *Re Read and Huggonson* was not published when the judgment in *Rex* v. *Almon* was written.

[3] *Anon.* (1731) 2 Barn. K. B. 43.

[4] *Rex* v. *Wiatt* (1723) 8 Mod. 123; and see *Rex* v. *Middleton*, Fort. 201. The reports state that the libel was against a Doctor of Divinity, but it is clear that attachment would not have been granted in the case of a libel on a private individual. The libel in fact contained expressions reflecting on the Court, and the case is so indexed in the Table to 8 Mod., *sub tit.* Attachment, and in 15 Vin. Abr. (p. 90, pl. 3). The report in 8 Mod. states that Dr. Colbatch was similarly punished the same term. Cf. the articles 'Conyers Middleton' and 'John Colbatch' in Dict. Nat. Biog.

mitted until further consideration of the matter. A few days afterwards the Doctor was brought into court and fined £50 and bound to his good behaviour for a year. It will be noticed that the sentence was based on the respondent's confession; whether it was regular to grant an attachment in such a case is a point to be considered later.

In 1722 an attachment was granted against John Bolton, clerk, for contemptuous words respecting the warrants of the Chief Justice of the King's Bench spoken at a meeting of his parishioners in the churchyard, and in 1721 one Barber was attached for contemptuous words of the same Court in a speech to the Common Council of London [1].

In 1720 one Wilkins, having confessed himself guilty of publishing a libel upon the King's Bench, was committed, fined, and ordered to give security for his good behaviour [2]; and, apart from slanders on the Court upon service of process, which stand on another footing, this appears to be the earliest recorded case in which the Court punished by summary process a libel or slander on itself, uttered by a stranger [3]. In an Appendix to the Report of the Select Committee in Burdett's case, to which we have already referred [1], is a collection of precedents of commitments for contempt by courts of justice, and the industry of the Committee was able to discover only one case of libel on the Court unconnected with the service of process in which a summary procedure was supposed to have been applied, before Wilkins' case in 1720, and that is the case of John de Northampton, an attorney of the King's Bench, in 18 Edward III, to which further reference will be made [4]. The gap is remarkable.

Hawkins, in his Pleas of the Crown, in specifying the incidents of courts of criminal jurisdiction, lays it down that such courts, being also courts of record, may fine for contempts in the face of the court, and 'it is said' that they (the court-leet excepted) may also imprison for such contempts; but he says nothing here of a power to fine or imprison for contempts done out of court [5]. Under the heading 'Attachment' he tells us [6] that if a contempt be

[1] These two cases are noted in Appendix E to the Report of the Select Committee in Burdett's case (1810) 8 How. St. Tr. 14, referred to at p. 184, *supra*. Barber's case is reported in 1 Stra. 444. It seems clear that slanders on the Court unconnected with the service of process, of which these two cases are examples, are on the same footing as libels with regard to the mode of procedure to punish them.

[2] Report of Select Committee, App. E, referred to in the last note. Dr. Colbatch (see note 4, p. 190) was alleged to be the author of the libel in this case.

[3] Disrespectful language of the Court on the service of its process may be distinguished from slander or libel on the Court unconnected with such service, in that the former is a direct impediment to the course of justice, whereas the latter can only operate indirectly and in some cases (e.g. where the proceeding to which it relates is concluded, as in *Reg.* v. *Gray* [1900] 2 Q. B. 36) can only affect the general administration of justice apart from any particular proceeding.

[4] See Part II, *infra*.

[5] 2 Hawk. P. C., ch. 1, s. 15.

[6] Ib., ch. 22, s. 1.

done by a person not present in court, a rule to attend and answer or a rule nisi for attachment will be made; or if the offence be of a very exorbitant nature, as for words of contempt of the Court itself, an attachment will be granted without any rule to show cause. The only references in the first edition of the work (1716–1721) were to cases of disrespectful words on the service of process. Some of the later editions refer to the case of *Rex* v. *Wiatt* (1723), mentioned above. In dealing with attachments for 'contemptuous words or writings concerning the Court,' Hawkins says[1]: 'It seems needless to put any instances of this kind which are generally so obvious to common understanding, and therefore I shall only observe that sometimes attachments have been granted for contemptuous words concerning the rules of the court without making any rule to show cause why such attachments should not be granted, because it would be vain to serve him with a second rule who has despised the first.' In the first edition the only reference is to a case of disrespectful words on the service of process; in some of the later editions the case of *Rex* v. *Barber* (1721), mentioned above, is referred to. So that, with the exception of cases decided in 1721 and 1723, Hawkins quotes no authority for the jurisdiction to punish strangers for libels on the Court by attachment.

Blackstone[2] includes under contempts punishable by attachment 'speaking or writing contemptuously of the Court or Judges acting in their judicial capacity,' but he cites no authorities.

Where Hawkins, Wilmot, and Blackstone have failed to cite authority, we may reasonably conclude that none is to be found. It will be observed that Wilmot J. does not refer to the reported cases of 1721, 1723, and 1731, which seems to show that the value he placed upon them as authorities was inconsiderable.

Chief Justice Gilbert, in his History of the Court of Common Pleas[3], suggests that commitment for contempt was derived from the Statute of Westminster II (13 Edward I), c. 39, which provides that if the sheriff's bailiffs testify that they cannot execute the King's precept because of the resistance of some great man, the sheriff is to go in person to do execution; and if he find his bailiffs false he shall punish them by imprisonment, and if he find them true he shall punish the resisters by imprisonment, from whence they shall not be delivered without the King's special commandment; and the sheriff is to certify to the Court the names of the resisters, and by a writ judicial they shall be attached by their

[1] 2 Hawk. P. C., ch. 22, s. 36. [2] Commentaries, iv. 285.
[3] 1st ed. (1737), p. 20.

bodies to appear at the King's Court, and if they be convict of such resistance they shall be punished at the King's pleasure; and the King reserves the assigning of the punishment specially to himself. Wilmot J.[1] considers that attachments did not take their rise from this statute, which he says only empowers the sheriff to imprison persons resisting process and has nothing to do with giving courts of justice power to vindicate their own dignity, and Blackstone takes the same view[2]. The statute, however, is instructive on the subject of attachment. The sheriff is to arrest and imprison the offender, who is to be brought before the King's Court by a writ of attachment, and if he be 'convict' he is to be punished. The word 'convict,' it would seem, is equivalent to 'convicted in the ordinary course of law,' for there is no suggestion of any other form of conviction where the word 'convict' or 'attainted' is used in the statutes of the period[3].

Blackstone refers to attachment as the method immemorially used by the superior courts of justice of punishing contempts, and states that the process must necessarily be as ancient as the laws themselves[4]. To prove the antiquity of 'attachment in general' he refers to two authorities only[5]. The first is Year Book 20 Henry VI. 37, where an attorney was taken under an attachment

[1] *Rex* v. *Almon*, 253.

[2] Commentaries, iv. 286.

[3] Cf. Stat. West. II (13 Edw. I), cc. 11, 12, 34, 36, 37, 38, 44. 'Attainted' is used as synonymous with 'convicted,' as in c. 34, the former being the equivalent for 'atteint' when the statute is in French and the latter for 'convictus' when the statute is in Latin. 'Atteint' is used in the Stat. West. I (3 Edw. I), c. 29 (still in force), providing for the punishment of 'any serjeant pleader or other who shall do any manner of deceit or collusion in the King's Court, and thereof be attainted.' (See the cases under this statute cited by Coke, 2 Inst. 215–7.) The same word 'atteint' is used in 25 Edw. III, stat. 5, c. 2, upon which Coke (3 Inst. 12) remarks: 'This word (attaint) necessarily implieth that he be proceeded with and attainted according to the due course and proceedings of law, and not by absolute power or by other means as in former times had been used.' Coke does not explain the last clause of this sentence, which it is submitted must refer to an illegal exercise of power and not to a mode of procedure sanctioned by the common law. See also 2 Inst. 37 and 1 Inst. s. 745. For other instances of the use of the word 'attaint' see Stat. West. I (3 Edw. I), cc. 1, 9, 15, 20, 24, 31, 32, 37, and cf. the expression 'indicted, arraigned, tried and attainted' in the Act 39 & 40 Geo. III, c. 93.

Lambard in his Archeion, written in 1591 (pp. 171–2), referring to certain offences punishable in the Star Chamber by statute, thus indicates the only forms of trial at law: 'And thus by the benefit of these two statutes the judicial handling of these eight offences which before did proceed as I partly touched either by way of indictment or action, may now be performed without any inquest or verdict, even by the only (i. e. 'mere') examination either of competent witnesses, of the parties themselves, or of both; a course which was never before permitted by the common law of the realm wherein no trial was allowed, but that only *per legale judicium parium*, as the great Charter itself plainly doth acknowledge.'

Cf. the statute 52 Hen. III, c. 3, providing punishment by fine for those who obstruct the execution of attachments, &c., and see the cases in 21 Edw. I and 3 Edw. II, referred to at p. 197, *infra*.

[4] Commentaries, iv. 283, 286. The fourth volume of the Commentaries was published in 1769, four years after *Rex* v. *Almon*. The author had submitted the proofs of part of the work to Mr. Justice Wilmot (Wilmot's Memoirs, 201).

[5] Commentaries, iv. 288.

to answer for issuing a *capias* of which there was no original. Upon examination he confessed the offence, and was sent to the Fleet; afterwards he came to the Court, and was put to his fine and received judgment that he be struck off the roll;—an instance apparently of the exercise by the Court of a statutory jurisdiction over its own officer[1]. The other case is in Year Book 22 Edward IV. 29, where, upon a prohibition, an attachment issued to enforce obedience to a writ requiring the Ordinary of St. Albans to assoilize a party who was excommunicate. Here the process was applied to enforce obedience to the King's writ in a civil action.

The earliest statute in which the full form of procedure by attachment, examination on oath, committal, and fine is prescribed in the case of contempt is 43 Elizabeth, c. 6, s. 1 of which provides for the punishment in this manner of a sheriff who makes a warrant without the authority of a writ, and all procurers thereof. This Act seems to provide a summary process for a case which previously would have been the subject of an action by writ of deceit under the Statute of Westminster I (3 Edward I), c. 29[2].

The origin of attachment is traced in the judgment of Fletcher J. in *Taaffe* v. *Downes*[3]. The action was brought against the Chief Justice of the King's Bench in Ireland for assault and false imprisonment. The defendant pleaded that the plaintiff was arrested under a warrant issued by the defendant as Chief Justice, and it was contended on the defendant's behalf that no action lay against him for an act done in his office of judge. The plaintiff demurred on the ground that the defendant's plea showed no cause for the arrest. The demurrer was overruled by the majority of the Court, Fletcher J. dissenting, and in his judgment the latter draws a distinction between the judicial and the ministerial acts of a judge. On the subject of attachment he says[4] that the judges of the Aula Regis issued their process for bringing any person before them who should be found to have broken the King's peace or who should appear disposed to break it. 'What was the process? It was a prerogative writ of the King to preserve the peace and enforce obedience to all orders of that high tribunal—the process of attachment, introduced and borrowed from the Norman laws—and this

[1] The statute 4 Hen. IV, c. 18 enables the justices at their discretion to put an attorney out of the roll for misconduct, after examination. See also Stat. West. I, c. 29, which provides for the punishment by imprisonment and fine (see 2 Inst. 168, 216) of deceit or collusion in the King's Court if the person charged 'thereof be attainted' (see note 3, p. 193, *supra*). The proceeding under this statute was by action of deceit (4 Inst. 102; *Allsby* v. *Colby* (1625) Cro. Jac. 694), and although this statute might have applied, the present case seems rather to have been under 4 Hen. IV, c. 18.

[2] See last note.

[3] Referred to at p. 187, *supra*.

[4] Hatchell's Report, p. 118 (see note 4, p. 186, *supra*).

was the process of the Aula Regis. Why was it resorted to by them? Because disobedience of their orders was a contempt of the King himself whose ministers they were. Their authority being in fact a delegation of that of the King, extended to all parts of the realm; and they issued their process against all persons who broke the peace or were likely to break it. By the Norman law it was established that nothing could be done but by the King's writ. This practice was introduced into the English law, and if the person to whom such writ was directed neglected to obey it, the neglect was termed a contempt of the King's authority and an attachment issued to punish the person guilty of it. And here was the true origin of attachments. It was a prerogative process derived from a presumed contempt of the King's authority.... As a proof that I have truly traced the origin of attachment I shall cite the words of the ancient writ "De homine replegiando" from the Registrum Brevium: "Nisi captus est per speciale preceptum nostrum vel capitalis justiciarii nostri, &c., quare secundum consuetudinem Angliae non sit replegiabilis," evidently alluding to cases of persons attached by the King or the Chief Justiciary before the division of the Courts, for contempts, who were not replevisable or bailable: a power possessed by the Chief Justiciary as the representative of majesty in the *Aula regia* and afterwards on the division of the courts distributed and bestowed by Statute W.I., ch. 5 (*sic*), upon the justices of the several newly-constituted courts, as is stated by Fitzherbert, N. B. 152 (2 Hale's ed.), in the passage cited by Gilbert and commented upon by Wilmot[1]; and accordingly persons so committed by any of those parties for a contempt are not at this day bailable by any other authority, being, as it were, committed in execution and punishment of the contempt. Such was the case of persons declared by the writ not to be replevisable—persons committed by the special command of the King or the Chief Justiciary presiding in the *Aula regia* by attachment, which was the process of that court, where its origin may be traced and is to be found[2].' Had this account been presented to Wilmot J. there is no reason to suppose that he would have declined to accept it as correct, though differing from Fletcher J. as to the issuing of a warrant being a judicial act. But the question remains, as pointed out by Bosanquet J. in *Miller* v. *Knox*[3]: 'What are those particular cases in which the punishment by attachment for contempt has been sanctioned by immemorial usage?' and this may be supplemented by the further question: What was the nature of the procedure

[1] *Rex* v. *Almon*, 253.

[2] Cf. Pollock & Maitland, Hist. Eng. Law, ii. 583; and see references to contempt of the King's writs and orders in the Leges Henrici Primi, x. 1; xiii. 1.

[3] (1838) 4 Bing. N. C. at p. 606, 44 R. R. 797, 798.

in such cases? Should it appear that in cases of contumelious contempts (which for the present purpose may be allowed to include all contempts except mere disobedience to the King's writ or neglect of duty by officers of the Court), attachment was only a process for bringing the accused before the Court, and that if he denied the offence he could claim trial by a jury, the procedure in such cases was no other than according to the ordinary course of law.

It is certain that at one time a jury was summoned to try questions of contumelious contempt. Hale, in his Discourse concerning the Courts of King's Bench and Common Pleas [1], refers to suits by bill at large in the King's Bench which were anciently practised by that Court but had been long disused. He says that these suits were for the most part for contempts, deceits, and trespasses upon the case, &c., and one of the instances he gives is in 30 Edward III [2] of a man attached by bill to answer to the King and a party for an assault committed on the plaintiff when he came to prosecute a suit in the King's Bench. This, then, appears to have been the procedure for punishing contempts of that description in early times—an attachment by bill to bring the defendant before the Court, where the question was tried in ordinary course of law. Upon a verdict of guilty the judgment was that the defendant be taken to satisfy the King for his fine, and upon finding pledges by recognizance for the payment he was discharged [3]; actual imprisonment was rare, at any rate in the thirteenth century [4]. The form of judgment was similar in the reign of Elizabeth. John Mucklow, a juror, for having in his possession a certain box of preserved barberries and sugar called sugar candy and sweet roots called liquorice when he retired to consider the verdict with his brother jurors, was committed to the Fleet until he should have made a fine with the Queen; and afterwards being brought to the bar he prayed to be admitted to make a fine and was so admitted by pledges and the fine was affeered by the justices at twenty shillings [5]. The procedure in this case appears to have been summary, a juror as a ministerial officer being under a special disciplinary jurisdiction [6].

Lord Ellesmere, in his Office of the Lord Chancellor [7], after referring to Magna Carta, c. 29, and the statutes 5 Edward III, c. 9, 25 Edward III, st. 5, c. 4, and 28 Edward III, c. 3, continues:

[1] Hargrave's Tracts, 363.
[2] Y. B. Lib. Ass. xxx. 14. Cf. *Byabeon's* case, ib. xxxix. 1.
[3] Lambard, Eirenarcha (ed. of 1619), 573, 574.
[4] Pollock and Maitland, Hist. Eng. Law, ii. 516.
[5] *Weltden* v. *Elkington* (1578), Plowden, 519 a.
[6] 2 Hawk. P. C. ch. 22, ss. 12–19.
[7] Page 53.

'By these statutes it seemeth that neither the King, Council, nor Chancellor might not attach imprison banish or put to death any man nor seize his lands nor goods or cause him to answer but upon indictment presentment or original';

and the author proceeds to show how the jurisdiction of the Council and the Chancery came to be acknowledged in cases where the suitor had no remedy at common law.

It is easy to see that if attachment was originally a means of enforcing the process of the Court, it might be applied to punish an obstruction to the service of process as a contempt of the King's writ. Wilmot J. suggests the question[1] whether the King's judges are not entitled to the same protection from a libellous attack as a bailiff's follower who is called a rogue and abused on serving the process of the Court. It would seem from the following cases that in early times contemptuous conduct on the service of process was punished after conviction by a jury and not by a summary procedure. In 21 Edward I, *A* brought the 'attachment on prohibition' against *W* and *Isabel* his wife on the King's behalf. *W* was charged with trampling the prohibition under his feet on being served with it and upon his denying the contempt the question was to be tried by a jury[2]. In 3 Edward II, the fact that a man on receiving a writ of prohibition threw it on the ground 'in contempt of our Lord the King,' was found by a jury[3]. In a later passage of his judgment[4] Wilmot J. thus distinguishes the principles which apply on abusing a process server and on libelling the Court:

'The principle upon which attachments are granted in respect of bailiffs is to facilitate the execution of the law by giving a summary and immediate redress and protection to the persons who undertake it.... But the principle upon which attachments issue for libels upon Courts is of a more enlarged and important nature—it is to keep a blaze of glory around them and to deter people from attempting to render them contemptible in the eyes of the public[5].'

[1] *Rex* v. *Almon*, 268.

[2] Year Books by Horwood, 21 & 22 Edw. I, p. 94.

[3] Placitorum Abbreviatio, p. 308, rot. 35, and see Stat. West. II, c. 39, referred to at p. 192, *supra*. The jurisdiction to punish such contempts summarily was established later, though it may be difficult to assign the date. Cf. Bacon's Chan. Orders of 1619, No. 77 (Sanders, Chan. Ord. 119).

[4] *Rex* v. *Almon*, 270.

[5] If the phrase be thought to savour too much of 'the right divine of kings' and the lustre conferred upon their representatives the judges, it may be answered that the fundamental idea is the same as when we say that in the interest of the public, for whose benefit the Courts exist, the Judges must be treated with proper respect. The Judges represent the King and the King represents his people. He still administers justice for the benefit of his subjects, but on less arbitrary lines than in the eleventh century and by delegating his powers to the Judges; and the same reason that rendered it necessary to prevent obstruction to the course of justice when the King sat to administer it in person applies in the case of his

If this view be accepted, it is clear that, however desirable it may be to prevent libels on Courts, no argument in favour of punishing them by summary procedure can be derived from analogy to the case of a process server, who must be immediately protected to prevent obstruction to the course of the proceedings.

JOHN CHARLES FOX.

delegates, namely, that by means of the obstruction the people are hindered in obtaining justice. The method to be adopted to prevent or remove the obstruction is another question.

(To be continued.)

CAN AN EASEMENT BE GRANTED IN PERPETUITY WITHOUT WORDS OF LIMITATION?

IN the January number of the LAW QUARTERLY, my friend Mr. Charles Sweet, in a footnote on page 28, states that if a form issued by the Land Registry 'is the proper way of creating an easement *de novo*, conveyancers have for generations laboured under two delusions, for it has hitherto been assumed . . . that proper words of limitation are necessary to create an easement in fee.' This hypothetical statement is substantially identical with a more positive footnote on page 1110 of Mr. Cyprian Williams's admirable work on Vendors and Purchasers. With these two exceptions, however, there is (so far as I can find) not a scrap of authority for the proposition, and there seems to be a good deal to be said against it.

An easement, even if it be an incorporeal hereditament at all[1], which is, to say the least, questionable, is very different from an incorporeal hereditament in gross, as it cannot exist except as appurtenant to a dominant tenement. It is neither a 'tenement,' for it is incapable of being entailed under the Statute De Donis, nor an 'estate,' for one cannot stand seised of it. It is but a bare right to a convenience binding on a neighbouring tenement, inseparable from the enjoyment of corporeal property. It is in no sense personal to the grantee. It is in fact begging the question to speak of it as 'an easement *in fee*.' If then it be granted to *A* (the fee simple owner of land *X*) 'and the owners or owner for the time being of *X* for ever,' what ground is there for the suggestion that the easement, which is expressed to be appurtenant to *X* in perpetuity, is confined to the life of the then fee simple owner? Unless there be some ancient authority that the technical words essential to the creation of an estate in fee simple are equally requisite to the creation of a perpetual easement, it is not likely that the Courts would sanction such a doctrine for the first time in these days.

Now it is certain that other rules of limitation of estates at common law are not applicable to easements—for instance, the

[1] See Goodeve's R. P., 5th ed., p. 13 note x. Hood & Challis (Conveyancing, &c. Acts, 6th ed., p. 150) distinctly state that 'easements are not incorporeal hereditaments but appurtenant rights,' and this was approved by Joyce J. in *Re Brotherton*, 52 Sol. Journ. 44. The point was not dealt with by the C. A. [1908] W. N. 56.

rule that an estate of freehold in corporeal hereditaments cannot be made to commence at a fixed future date is not applicable to the creation *de novo* of any incorporeal hereditament, even a rent or a profit in gross (Challis, R. P., 2nd ed., p. 101); and apparently that rule only applies to limitations of incorporeal hereditaments in gross already in existence, by analogy to legal estates (ib.).

The necessity for words of limitation in the case of the creation or conveyance of a fee simple estate seems to depend on considerations as to the limitation of estates of inheritance which have no bearing whatever on the creation of an easement.

A mere covenant will (on the ground of intention) be construed as a grant of a perpetual legal easement[1], whereas no one would I suppose contend that a covenant (other than a covenant to stand seised operating under the Statute of Uses) would operate as a legal conveyance of a corporeal hereditament in fee. This suggests that *intention* is the test, whereas no amount of intention is sufficient to pass the legal estate in a corporeal fee simple.

In *Northam* v. *Hurley* the judgment of the Court states that 'if the easement was granted to the owners of Fourth Tanners Meadow, we think that the precedents are clear that it may be described in a declaration as an easement to which the plaintiff is entitled by reason of his possession of that meadow.'

In the comparatively recent case of *Rymer* v. *McIlroy* [1897] 1 Ch. 528, the late Mr. Justice Byrne held that the grant of an easement to *A* his heirs and assigns in respect of Blackacre, of which *A* was then merely tenant from year to year, created a *perpetual* easement appurtenant to Blackacre when *A* subsequently acquired the fee. This decision surely shows that in the learned judge's view such rights are contractual (in the nature of covenants running with the land), and that as, on the construction of the grant, the *intention* was to grant a perpetual easement so long as *A* his heirs or his assigns were possessed of Blackacre, it was immaterial that at the date of the grant he only had a chattel interest therein. For it is obvious that if an easement be regarded as a common law *quasi estate*, then, as it is only capable of being enjoyed in perpetuity as appurtenant to land, the grant to a yearly tenant could not be a grant in fee in its inception, and could not be subsequently enlarged by an increase in the estate of the dominant owner.

On the whole, having regard to the great difference between an estate of freehold in corporeal hereditaments, and an easement,

[1] See *Holmes* v. *Seller*, 3 Lev. 305, Com. Dig. Chimir D. 3; *Senhouse* v. *Christian*, 1. T. R. 560, 1 R. R. 300; *Gerrard* v. *Cooke*, 2 B. & P. (N. R.) 109; *Northam* v. *Hurley*, 1 El. & Bl. 665, 93 R. R. 329; *White* v. *Lessor*, 5 H. & N. 53; *Rowbotham* v. *Wilson*, 8 H. L. C. 362.

which cannot be the subject of tenure, and to the complete absence of any authority for the proposition that an easement cannot be perpetually annexed to a fee simple dominant tenement without the words of limitation essential to the assurance of a fee simple estate, it is submitted that the practice of conveyancers in using words of limitation in the creation of easements *de novo* has been merely *ex abundanti cautela*.

ARTHUR UNDERHILL.

ALIENATIONS BY MARRIED WOMEN WITHOUT SEPARATE EXAMINATION.

IN *Johnson* v. *Clark* [1908] 1 Ch. 303, 77 L. J. Ch. 127, Parker J. held that a custom 'that a married woman by her husband's consent could dispose of her hereditaments of burgage tenure by deed without separate examination' is bad. To this extent it is in direct conflict to the decision in *Compton* v. *Collinson* (1788–90) 2 Bro. C. C. 377, 1 H. Bl. 334, 2 R. R. 786, to which his Lordship's attention was not called. *Compton* v. *Collinson* was a suit in Chancery for the purpose of obtaining a surrender from the customary heir of a married woman. The main facts were that Michael Collinson and Jane Collinson executed a separation deed, in which the husband covenanted in effect with trustees that his wife should enjoy to her own use all such estates, real and personal, as should come to her during coverture, or that he should become entitled to in her right, and to assure them to such uses as she should appoint. Subsequently the wife became entitled to freehold and copyhold estates as heiress of her father, and thereupon another deed was executed, which contained a covenant by the husband in terms similar to that in the first deed. The wife surrendered copyhold estates descended to the uses of her will, and charged the property in favour of John Willis, who was her executor, to secure certain sums of money. The wife died, and John Willis proved her will. The plaintiff derived title under John Willis. At the hearing before Buller J., assisted by Masters Gravy and Eames, sitting for the Lord Chancellor, the Court directed a case to be made for the Court of Common Pleas whether John Willis took any and what estate under the surrender, will, and codicil of Jane Collinson. From the report of the proceedings at law, it is clear that the surrenders had been made without a separate examination of the wife, and without the concurrence of the husband. This is left in doubt in the report in Brown, and indeed in the Register Book (Reg. Lib. 1787 A. fo. 694). In the course of the argument for the customary heir (1 H. Bl. 338) the point is taken: 'It is also to be observed in this case that no special custom of the manors is stated to warrant the surrenders by the wife alone, nor that she was separately examined by the steward according to the general law of copyhold.' That this point was

present to the court is clear from the judgment of Lord Loughborough (1 H. Bl. 340; 2 R. R. 786). He says:

'The several surrenders on the face of them are the surrenders of Jane Collinson as a feme sole: for it is not stated that she was privately examined, nor is any notice taken of her being a feme covert, nor is there any assent, or evidence of assent, on the part of the husband accompanying the surrenders.'

The certificate returned was to the effect that the surrenderee from the wife 'took an estate to him and his heirs, according to the several customs of the manors.'

The foundation of the judgment of Parker J. in *Johnson* v. *Clark* is that the separate examination of a married woman was essential to the validity of her alienation at the common law, and that a custom dispensing with her separate examination was necessarily invalid, but this is a fallacy—see Hargrave's note (171) to 1 Inst. 121 *a*. It is true that in *Compton* v. *Collinson* Lord Loughborough does not appear to have dealt specifically with the point whether a separate examination was a necessary formality to the alienation by a married woman, but the authorities show that the practice of a separate examination was only to inform the conscience of the court that the married woman was acting as a free agent. Form CCCLVII (5 Rich. I) in Madox, Form. Angl. should, perhaps, be left out of account, for the practice of recording the separate examination on the roll may have arisen after 18 Ed. I; but in the extracts from two recorded fines in the same book (fo. xviii, Diss.) the husbands are stated to have appeared as attorneys for their wives, in which event a separate examination was probably dispensed with. From the *Earl of Bedford's Case* (1587) 7 Co. 6 *b*, and other cases it appears that if a married woman levied a fine, concealing the fact of her marriage, and consequently without being separately examined, the fine bound her and her heirs, unless the husband entered or survived the wife (see note to *Combe* v. *Mayo*, Pollexfen, at p. 171). Apparently these cases were not cited in *Johnson* v. *Clark*. As pointed out by Lord Loughborough in *Compton* v. *Collinson*, the estate of husband and wife in customary lands differs materially from their common law rights in the lands belonging to either of them. At the common law, the wife's lands vested in husband and wife as tenants by entireties, and as is shown by *Combe* v. *Mayo*, Pollexfen, 164, the wife could not defeat the rights of the husband without his consent. So, too, the wife's right to dower could not be defeated at the common law without her consent, and only conditionally by a jointure under the Statute of Uses. In these respects, therefore, the reciprocal rights of husband and wife

in each other's lands recall the proprietary incidents following upon a French marriage 'avec communauté de biens'—see *In re de Nicols, de Nicols* v. *Curlier* [1900] 2 Ch. 410. In the case of customary lands, dower or free-bench could only be claimed if warranted by custom. According to the custom, it might extend to the entirety of the husband's lands: Co. Lit. 110 *b*; or might be defeated by the husband at his pleasure, *Benson* v. *Scot* (1693) 3 Lev. 385; or might be defeated conditionally, Fitzh. Ab. tit. Prescription, pl. 30. So, too, in the case of customary lands, the husband was only entitled to an estate by the curtesy, if there were a custom warranting it. In this connexion one cannot but feel the force of Lord Loughborough's comment (1 H. Bl. 343, 2 R. R. 789):

'It has always appeared to me somewhat arbitrary to condemn a custom because it is not conformable to the general law and policy of the nation. That estates should be holden in some manors by an heiress independent of her husband, is not more singular than in others that the estate should vest in the husband by the intermarriage, which is the case in some manors in Westmoreland.'

With regard to the cases referred to by Parker J., it is to be observed that *Skipwith's* case may be left out of account, for the reasons stated by the learned judge. The dictum in *Needler* v. *Bishop of Winchester* is inconsistent with the decision in *Compton* v. *Collinson*. In *George* v. *Jew* there had been no customary conveyance by surrender, so that the statement that a custom to bar without surrender or private examination is bad is only a dictum and inconsistent with *Compton* v. *Collinson*. In *Doe* v. *Bartle* the custom stated in the special case (5 B. & Ald. at p. 494) is 'a custom enabling a feme covert to pass by her will copyhold lands which have been surrendered to the use of the wife's will, by the husband and wife, the wife being examined by the steward, separate and apart from the husband, and consenting.' It is a pertinent fact that Lord Tenterden and Bayley and Holroyd JJ. rest their decision upon the provision in the custom requiring a separate examination to render the surrender of a married woman valid, and they carefully abstain from saying that Preston's Act could never apply to the will of a married woman; and Lord Wynford, who had recently been called to the bar when *Compton* v. *Collinson* was decided, apparently expressed a formal concurrence in the judgment.

That part of the judgment which appears in an abridged form within brackets at p. 319 of [1908] 1 Ch. is also open to comment. It is stated that his lordship held:

'that the mortgage of June 11, 1891, was never delivered to Clark otherwise than for the purpose of enabling him to raise

money for the benefit of the plaintiff's husband, and was not intended to operate until the money had been raised for this purpose, and therefore that the mortgage could not stand as any security to Clark.'

Now the weight of authority is certainly in favour of holding that a deed cannot be delivered as an escrow if handed over to a grantee—see *Thoroughgood's case* (1612) 9 Co. 137, 1 Co. Lit. 36 *a*, and n. (3) and the cases there noted—and the qualification which it is suggested in *London Freehold & Leasehold Property Co.* v. *Baron Suffield* [1897] 2 Ch. 608 might exist, would have had no application in *Johnson* v. *Clark*.

A. E. RANDALL.

[With great respect for our learned contributor's argument, there seems to be a material distinction between the present case and *Compton* v. *Collinson*. There the husband and wife were living apart under articles of separation, and therefore the Court had no need to be informed by separate examination that she was not acting under his influence.—F. P.]

MARITIME SALVAGE AND CHARTERED FREIGHT.

THE proposition to be considered may be stated shortly, thus:—

When a ship under charter proceeding in ballast to an outward port, there to load and bring back a specified cargo, is rescued from danger under circumstances which entitle her rescuer to rank as a salvor in the courts of this country, can the salvor make good a claim for remuneration in respect of the freight then in course of being earned under the charterparty?

Let it be granted that the contract of affreightment is to be looked for in the charterparty alone, that no bills of lading are to be issued, and that the circumstances of the case are as follow:

A vessel sails from London under a charter which provides that she shall proceed in ballast to a port in the Gulf of Mexico, and from there bring back a full cargo of grain for delivery at a home port. For this service the charterer contracts to pay the shipowners the sum of £3,000 on the true delivery of the cargo in the Thames. Whilst proceeding down the English Channel on her outward voyage, the vessel, losing her rudder, becomes unmanageable and is towed under a salvage agreement—properly so-called—into Plymouth and there repaired. A dispute arising as to the amount of his remuneration based on services to the ship as also on services to the chartered freight, the salvor arrests the vessel, and obtaining bail for the amount of his claim, forthwith institutes a suit in the Court of Admiralty against the shipowners, who refuse to recognize his right to reward in respect of the freight of £3,000. The vessel thereupon being released proceeds on her voyage, and—the action having become a proceeding *in personam* against the shipowners and their bail[1]—her ultimate safe arrival ceases to be material to the issue[2].

The salvor contends that the chartered freight being an interest in the property saved, which interest has been saved to the ship-

[1] Abbott, Law of Merchant Ships, Seamen, 10th ed., 1856, by Mr. Serjeant Shee at p. 539.

[2] 'The bail represents the ship, and when a ship is once released upon bail she is altogether released from that action.' Dr. Lushington in *The Kalamazoo* (1851) 15 Jur. at p. 886. See also *The Christiansborg* (1885) 10 P. D. 141 at p. 156.

owners equally with their ship, is liable to contribute to the Salvage Award[1].

Is this contention well founded?

In the *Gas Float Whitton No. 2*[2], Lord Esher M.R. said: 'I come, therefore, to the conclusion that by the Common Law of the High Court of Admiralty, the only subjects in respect of the saving of which Salvage Reward could be entertained in the Admiralty Court were ship, her apparel, and cargo, including flotsam, jetsam, and lagan, and the wreck of these and freight; (and) that the only subject added by Statute is Life Salvage.' Which statement of law was approved on appeal in the House of Lords, where Lord Watson said: 'I am satisfied that the subjects of Maritime Salvage have been correctly defined in the clear and exhaustive judgment delivered by Lord Esher M.R. on behalf of the Court of Appeal[3].'

The subjects then of salvage assessable for the payment of it are three only—ship, cargo, and freight. Against them the salvor can enforce his rights by virtue of his maritime lien, which operates to effect the arrest of the property, and to procure, if necessary, its sale. And it is only in respect of property presently existing and capable by arrest[4] of being brought before the Court, that a proceeding *in rem* can be instituted, or that a salvage suit *in personam* will be allowed.

Thus, in *The Chieftain* (1846)[5] where the salvors sought to proceed by way of monition against the owners of a salved vessel and cargo, citing them to appear and defend the suit, the facts being that since the rendering of the service the ship had been lost, Dr. Lushington refusing the application, said:

'There seems to me the greatest possible difficulty in acceding to this motion, as the property is actually lost and gone, and a Monition to show cause is decreed only in cases where the property has been allowed to go into the hands of the owners, instead of the parties attaching the property itself. In no case has a Monition to show cause issued against the owners of property which has

[1] Though it is general to speak of *contribution* to salvage, the word is apt to mislead. For salvage is a charge by operation of law attaching to the property itself; and it is only where a sum has to be apportioned over an entire property, that as between parts of that property, there may be said to be contribution to a salvor's reward. By the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60, s. 544), following earlier Acts now repealed, an obligation is imposed on the owners of ships and cargo salved to pay 'a reasonable amount of salvage' in respect of the saving of life. But this is a payment by one interest for the saving of another, and is not strictly salvage.

[2] C. A. [1896] P. at p. 63.

[3] [1897] A. C. at p. 348.

[4] By this it is not meant that freight itself can be arrested. But where freight has been earned, bail for it can be enforced by the arrest of the ship, or the payment of it into Court can be secured, by the arrest of the cargo. *The Ringdove* (1858) Swa. Ad. 310; *The Leo* (1862) 31 L. J. N. S. Ad. at p. 79, 1 Lush. A. R. at p. 447; Roscoe, Adm. Pr. 2nd ed. at p. 165.

[5] 4 Notes of Cases at p. 460.

been lost. It would be to convert the jurisdiction of this Court from a proceeding *in rem* to a proceeding *in personam*, which can only be where the property is in the possession of the proprietors themselves[1].'

Of the three subjects of salvage, there was, in the case under consideration, but one existing at the time of the service rendered, namely the ship; by the arrest of which alone—if at all—could the chartered freight be attached and brought before the Court.

Does the arrest of a ship in ballast carry with it the attachment of chartered freight—freight admittedly in course of being earned, though as yet non-existent?

In the true answer to this question the solution of the problem is to be found. Among the many considerations by which the Court is guided for the purpose of assessing an award, the value of the property saved—though not the most important—is an element entirely indispensable. For it is at once the foundation on which every award must be constructed, and the limit of liberality to the salvor beyond which the Court cannot go[2]. And as 'in the infancy of commerce' payment of salvage 'was more frequently made by the delivery of some portion of the specific articles saved or recovered[3],' so to-day is the same principle rigorously upheld by the Court of Admiralty, which by its decree awarding to the salvor a proportion of the value saved, allows him, in effect, to retain the same proportionate part of the property itself.

What is the value of a ship?

There is an answer to this question which requires examination. Lowndes says[4]: 'The freight which at any given moment a ship is engaged in earning is a constituent part of that ship's value at that moment.' Yet his reasoning is not convincing!

He supposes the case of two would-be purchasers of the same vessel, one of whom has a contract ready, and the other an engagement in sure prospect, by which each stands to make a profit of £1,500 in six months, at the end of which time it is conceived by both that the vessel will be worth £8,500. 'On these facts,' says

[1] For the present day development of this principle see *Cargo ex Port Victor* [1901] P. 243 at p. 256, approving *Five Steel Barges* (1890) 15 P. D. 142.
Carver points out that although by the M. S. Act, 1894 (57 & 58 Vict. c. 60), salvage is to be payable by the owner of the vessel, cargo, &c., 'no general personal liability seems to have been imposed, either for life salvage under s. 544 or for salvage to property under s. 546. The claim of the salvor still depends upon the safety of some of the property; and the liability of the owner of the ship or of the cargo, is still limited by the value of the property belonging to him which has been saved' (Carriage by Sea, 4th ed., 1905, at p. 399). See also *Cargo ex Port Victor* (supra) at p. 255.

[2] *The City of Chester* (1884) 9 P. D. at p. 202. But as to Life Salvage, see M. S. Act, 1894, s. 544, subs. (3).

[3] Abbott, supra, 1827, 5th ed. (author's) at p. 397.

[4] Mar. Ins. 2nd ed., 1885, pp. 13 and 168.

Lowndes, 'each should be ready to bid up to £10,000.' Why so? Is it not clear that no man will invest £10,000 to-day for the reason only that he will, after the lapse of six months, be in a position to realize the same sum? Does not this argument rather tend to show that the value of the ship must be at least something less than the combined sums of £8,500 and £1,500, and that the latter amount being the benefit sought by the purchaser to be acquired by possession of the freight-earning machine, is not, within the ordinary meaning of English as used by commercial men, a part of the purchasable value of the machine itself?

The Court of Admiralty and Courts of Common Law alike have always recognized the existence of a ship as apart from the existence of her freight, and have not—so far—sanctioned the merging of the one into the other; and though it be true that by the sale of his ship an owner divests himself of his right to freight which is incident to the ship, yet the purchaser is not bound by any existing contract of affreightment. For the contract to pay freight is not transferred to the new owner by the sale of the ship, and the rights of owners of cargo laden on board, being personal and lying in contract with the shipowner, do not run with the ship[1]. And so in *The Sea Insurance Co.* v. *Hadden*[2] (1884), Brett M. R.: 'The Absence of the contract of Affreightment does not diminish the value of the ship, the existence of it does not add to the value of the ship. It is no part of the ship. It is independent of the ship, although it can only be fulfilled by means of that ship. Therefore it is not within the definitions of those contracts which are said to be incident to the ownership[3].'

From this it must follow, that as a subject of salvage is only assessable in respect of whatever being a component part of its value is a component part of the subject itself, chartered freight in course of being earned cannot be attached by the arrest of a vessel by which it is in contemplation to earn it. And in truth the opposite conclusion would have the strange effect of giving a salvor recourse against that which was as yet but a right of the shipowner to earn freight, while as regards his actual right to freight which would accrue after the cargo had been put on board,

[1] *Case* v. *Davidson* (1816) 5 M. & S. 79 at p. 89, 17 R. R. 280; *Miller* v. *Woodfall* (Q. B. 1857) 8 El. & Bl. 493 at p. 503, 27 L. J. Q. B. 120.

[2] 13 Q. B. 706 at p. 713, and see *Hickie* v. *Rodocanakie* (1859) 4 H. & N. 455 at pp. 465, 466.

[3] In the *Steamship Carisbrook Co.* v. *Lond. & Prov. Ins. Co.* [1902] 2 K. B. 681 at p. 683, C. A., where a ship being in ballast and under charter, counsel for her owners contended that her future possibilities of earning freight were part of the ship's value, and that to make her contribute to general average in respect of homeward freight was to make her contribute twice over, the Court disregarded the contention and held the freight liable to contribute to the General Average sacrifice in the outward voyage.

it would not be permissible to arrest either the cargo or the vessel carrying it, unless and until that freight had become due[1].

This proposition, however, has by some been thought to be inconsistent with the decisions in the following cases:

The Dorothy Foster (1805)[2]. The facts of this case, so far as they are to be gathered from the somewhat meagre report, would seem to be that the vessel laden with a cargo for England was proceeding from her loading port in Jamaica to another port in that island for the purpose of joining convoy; that whilst so proceeding, she was captured by a French privateer, and recaptured by persons who put off in a boat from the shore, and who, on the arrival of the vessel in this country, claimed salvage in respect—*inter alia*—of the freight which in result was earned. Sir William Scott held, that although the vessel at the time of the recapture was proceeding to join convoy, she was none the less *in itinere* for England, and that the freight was in course of being earned, and was for that reason liable for salvage.

The Progress (1810)[3]. In this case the vessel in ballast and under charter was recaptured at Oporto by the allied British and Portuguese army under Lord Wellington. She was thus enabled to load a cargo of wine and bring it back to her chartered destination in this country, and so to earn her whole freight. Once more Sir William Scott held that at the time of her recapture the vessel was *in itinere*, and in the course of earning her freight, and that, therefore, the freight was liable for salvage.

The Orpheus (1871)[4]. This was a case of collision. The vessel with a cargo of salt for Viborg was proceeding to that port under charter, there to load, and bring back a cargo of deals, when she collided with another vessel by which she was eventually arrested on her arrival back at Grimsby. The cargo was also arrested in order to secure the payment of freight into Court. Sir Robert Phillimore held that at the time of the collision two freights were in course of being earned, and that the homeward freight, which alone was before the Court, was liable to contribute to the collision damages[5].

Now, whatever the extent of the analogy to be drawn from these cases, the proposition under consideration differs from them in one paramount respect—there was not, and could not be freight before the Court, because no freight had in fact become due. The proposition is not inconsistent with the cases; it is fundamentally dis-

[1] *The Flora*, L. R. 1 A. & E. 45.
[2] 6 C. Rob. 88.
[3] Edw. Ad. 210.
[4] L. R. 3 A. & E. 308.
[5] The same principle underlies Dr. Lushington's judgment in *The Norma* (1860) Lush. 124, where the vessel was on her homeward voyage with freight on board.

similar. But the salvor, not convinced, still contends on the authority of *Five Steel Barges*[1] that chartered freight being an interest in the ship which has been saved, is chargeable with salvage services, and that in respect of this freight, an action *in personam* will lie against the owner of the vessel earning it. To this it would seem a sufficient answer to say, that a proceeding *in personam* is merely a form of action, and that where an action *in rem*—'the ancient foundation of a salvage suit[2]'—does not lie, a proceeding *in personam* will not be allowed[3]. But this apart, the case cited—the circumstances of which were unusual—is free from ambiguity, and does not bear the construction sought to be put upon it by the salvor. The facts were as follow:

The defendants were under a contract to build and deliver certain barges to the government. The barges were being towed by the plaintiffs for the defendants from Chepstow to Portland, and were salved by the plaintiffs, who brought an action *in personam* against the defendants in respect of two barges which were given up to the government. It was argued for the plaintiffs that the defendants had an interest in the barges being delivered safely to the government, and that, therefore, a service was rendered to them personally. It was said in answer, that the plaintiff salvors had lost any rights they possessed against the barges by giving them up to the government without asserting their lien, and that the defendant builders had no property in them. But Sir James Hannen, finding that in case of non-delivery of the barges the builders, though not the legal owners, would have been liable to the government for their contract value, held that they had the interest of an owner in that value and awarded salvage accordingly. 'It appears to me, therefore, that they (the builders) had substantially an interest to the full amount of the barges at the time of the services, and that the same moral obligation to which the law has given force in case of an owner, applies to those who have an interest in the property' (at p. 147). This case was approved by the Court of Appeal in *Cargo ex Port Victor*[4] where the facts, though far from being identical, were nevertheless of the same nature.

Government stores were shipped on a chartered vessel subject to the stipulations of a freight engagement under which the owners (the term including the charterers) were responsible for the safe delivery of the stores. In the course of her voyage the vessel having been in collision required salvage assistance in putting into a port of distress. The salvor brought an action *in personam* against the charterers in respect of services to the government stores, in

[1] (1890) 15 P. D. 142. [2] Dr. Lushington in *The Fusilier*, Br. & L. 341 at p. 344.
[3] *The Chieftain*, supra. [4] [1901] P. 243.

the preservation of which they were interested. The Court held that the action would lie.

Lord Alverstone C. J. said (at p. 255): 'I think that in a common maritime adventure of this kind, at least, the persons who have the interest of owners in the goods by virtue of the contract they have made for the purpose of delivery, have an interest for the purpose of salvage.' But freight—chartered or otherwise—is not, as has been shown, a part of the value of a ship; and for this reason is not, in the sense of these judgments, an interest of the shipowner in that value.

The answer then to the salvor must be—chartered freight in course of being earned by a vessel in ballast is not a subject of Maritime Salvage.

H. Birch Sharpe.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A Concise Treatise on the Law of Wills. By H. S. THEOBALD. Seventh Edition. London: Stevens & Sons, Lim. 1908. La. 8vo. clvii and 991 pp. (35*s.*)

THE new edition of this useful book contains about fifty additional pages, representing the normal growth of the case law on Wills during the interval of three years which have passed since the last edition was issued. There is no substantial alteration in the arrangement of the book, but the cases as to the devolution of trust and powers on death have been collected in a short new chapter (xxxvi).

The preface states some weighty reasons for questioning the well-known case of *In re Warren's Trusts* (1884) 26 Ch. D. 208, in which it was held that the equitable doctrine of election was not applicable in aid of remote appointments, but as the decision has been followed in three recent cases (see p. 105) the author does not anticipate any immediate correction of the anomaly thus introduced into the doctrine of election. The late Lord Justice Kay would probably have favoured the author's views upon the point, see *In re Brooksbank* (1886) 34 Ch. D. 160.

In the sixth edition of this book the author treated the application of the rule against perpetuities to common law remainders (*Frost* v. *Frost* (1889) 43 Ch. D. 246), and to common law conditions (*In re Hollis's Hospital* [1899] 2 Ch. 540) as established law, but *Frost* v. *Frost* is ambiguous upon the former point, and *In re Hollis's Hospital* is now admitted in this edition (p. 599) to be open to criticism. The author, however, repeats and fortifies his former statement as to the application of the rule against perpetuities to common law remainders by a reference to *In re Ashforth* [1905] 1 Ch. 535; but the future gift in that case might well be explained as an equitable or executory limitation, to which the rule against perpetuities would be clearly applicable, so that it was, and still is, premature to treat the application of that rule as established law, either in the case of common law remainders or in the case of common law conditions.

O. A. S.

The Theory and Practice of the Law of Evidence. By WILLIAM WILLS. Second Edition. By the Author and THORNTON LAWES. London: Stevens & Sons, Lim. 1907. 8vo. lxviii and 524 pp. (15*s.*)

WE are glad to see that this useful work has now reached a second edition. Founded on a course of lectures delivered to the students of the

Incorporated Law Society as far back as 1889, it first appeared in book form in 1894. During the thirteen years that have elapsed since the last edition various changes have taken place in the law of evidence, and a good many important cases been decided. These have, for the most part, been duly chronicled by the present editors, chief among the statutory alterations being, of course, the Criminal Evidence Act, 1898, the various provisions of which are now incorporated in the text, the Act itself being given in an Appendix. With regard to the cases, the editors appear to have been rather less diligent, for we notice that a good many decisions that might profitably have been included are absent, e. g. *R.* v. *Bond* [1906] 2 K. B. 389 (similar facts); *Dashwood* v. *Magniac* [1891] 3 Ch. 306 (usage); *R.* v. *Moore*, 61 L. J. M. C. 80 (oaths); *Cowen* v. *Truefitt* [1899] 2 Ch. 309, and *May* v. *Platt* [1900] 1 Ch. 616 (mistake in documents); and *Higgins* v. *Dawson* [1902] A. C. 1 (interpretation). The *Poulett* (not Powlett) *Peerage case* [1903] A. C. 395 is cited, but not for the principal point established.

The passing of the Criminal Evidence Act, 1898 has apparently induced the editors to revise the whole subject of the competency and compellability of witnesses, and great pains, they add, have been taken to state the existing law fully and clearly. Nevertheless on pp. 130–1 an important misstatement occurs. 'By virtue,' they remark, 'of the Common Law and sections 2 and 3 of 32 & 33 Vict. c. 68,' neither the parties in breach of promise actions, nor the parties and their husbands and wives in proceedings instituted in consequence of adultery, are compellable witnesses. This, however, is clearly erroneous, as it wholly ignores the operation of the Evidence Acts of 1851 and 1853. The exceptions contained in these Statutes as to breach of promise and divorce having been repealed by the Act of 1869, parties and their husbands and wives in the above proceedings were placed in the same position as to compellability as ordinary witnesses, notwithstanding that they were again rendered 'competent,' though without the addition of the word 'compellable,' by the last mentioned Act. This was clearly pointed out by the late Mr. Pitt Taylor in his eighth edition, ss. 1353–5, as well as by Lopes J. in *Guardians of Nottingham* v. *Tomkinson*, 4 C. P. D. p. 350, the effect of whose remarks is not quite accurately given in Mr. Wills's note on p. 131. A more serious error, perhaps, is to be found on pp. 206–9, where the editors take much pains to maintain that declarations by the parties to a marriage are receivable, as exceptions to the hearsay rule, to prove the marriage, whether the declarants be living or dead, and whether the case be one of pedigree or not. No doubt, where a marriage is sought to be proved presumptively by cohabitation and treatment, the declarations not only of the parties themselves, but of their relatives and friends, may often become admissible. They are received, however, not as evidence of the truth of the declarations, but merely to show the character of the cohabitation and treatment, i. e. as part of the *res gesta*, the *res gesta* here being not the marriage itself, but the cohabitation and course of conduct from which it may be inferred. As bare assertions, severed from conduct, they are by the law of England pure hearsay, and not receivable, except as admissions, or as declarations made by deceased relatives on questions of pedigree (*Dysart Peerage case*, 6 App. Cas. 501–3). Again, the statement of the editors on p. 50 that the legal presumption of death, from a person not having been heard of for seven years, does not arise 'if there is nothing to indicate that he went abroad,' is not strictly correct. A presumption of law will equally arise where the absence has merely been from his usual place of resort.

From the point of view of the practitioner, perhaps the most valuable part of Mr. Wills's book is the excellent table of public documents and facts, together with their respective means of proof, which is furnished in Appendix A. Some thirty years ago the late Mr. Nasmith introduced this feature into his little work on Evidence, forming Volume IV of his Institutes of English Law; but Mr. Wills's list is of a much more complete and detailed description. That this list has proved of practical utility seems to be demonstrated by the fact that it has now been extended to treble its original length.

On the whole, and although the present volume makes no claim to be exhaustive, we can commend it as a sound and careful survey of the law of evidence.

S. L. P.

Leading Cases on the Law of Evidence. By ERNEST COCKLE. London: Sweet & Maxwell, Lim. 1907. 8vo. xiii and 224 pp. (*7s. 6d.*)

CONDENSATION has its virtues, but it is questionable whether Mr. Cockle has not carried the tabloid principle rather too far in his recent little book of leading cases. Some 160 of these have been selected, and their essence is offered in 224 pages of text. To effect this, statements of fact have been curtailed or dispensed with, arguments as a rule sacrificed, and judgments cut down often to a sentence or two. But when all this is done, what becomes of the leading case, or at least of its educational value? We confess that we do not quite appreciate the necessity for this homeopathic treatment, even in the case of students, especially as increased attention is intended to be given to the subject of evidence in future Bar Examinations. Assuming, however, that the necessity exists, Mr. Cockle appears, on the whole, to have done his work effectively. The book starts with an excellent analytical Table of Contents, all the headings and sub-headings of which are in turn illustrated by appropriate typical cases. Brief explanatory notes have also been added wherever necessary. But, beyond this, parsimony reigns, and commendation becomes more difficult; for not a single decision is cited except the leading cases themselves, nor has any attempt been made to bring the law of the latter up to date. Thus, on p. 18, the presumption as to the continuance of life is still given as one of *law*, though the contrary has frequently been decided; and on p. 175 the old heresy that 'parol evidence is admissible to explain latent, but not patent, ambiguities,' is once more revived, though we had thought that its ghost was long since laid. Again, the important case of *Sugden* v. *St. Leonards* is left without any hint of the serious strictures to which it was subjected in the House of Lords and elsewhere; and the *Duchess of Kingston's* case without the modern qualification that judgments are only conclusive as evidence where there has been no opportunity of pleading them. On p. 99, *R.* v. *Eriswell* is represented as deciding that *ex parte* statements, although made on oath before magistrates, are inadmissible. The decision, however, was precisely the other way, for the Court below had admitted the evidence, and on appeal the judges being equally divided, that decision was affirmed. The inadmissibility of such evidence was, indeed, established by later cases, but no indication of these is supplied by Mr. Cockle. Nor is the author much happier in his statement of the rules as to estoppel; indeed, here, as occasionally elsewhere, accuracy has evidently been sacrificed to compression. It is not correct to say, baldly, that 'a party to a judgment is estopped from denying the facts on which

it is based' (p. 24); nor that 'a person who has executed a deed is estopped from denying its contents' (p. 28). In both cases mutuality is required; and in the latter, the rule only applies in actions on the deed. Relevancy is not synonymous with 'connection' (p. 33), but with logical connection; nor were there formerly only two grounds of incompetency for witnesses (p. 190).

In America the law student has been provided with such masterly compilations of Cases on Evidence by Professors Thayer and Wigmore respectively, that we should have been glad to see Mr. Cockle take a more ambitious and critical view of his task in this country.

S. L. P.

Paterson's Licensing Acts, with Forms. By the late JAMES PATERSON. Nineteenth Edition. By WILLIAM W. MACKENZIE. London: Butterworth & Co. 1908. 8vo. lxxxii, 798 and 185 pp. (15*s.* net.)

'PATERSON' may now almost be reckoned as a 'hardy annual'—a testimony alike to the success of the book and to the gathering importance of, and the growing law upon, the subject. And with each quickly succeeding new edition the bulk of the volume increases. The present issue is, for example, not far short of twice the size of the fifteenth edition, published so recently as 1903, insomuch that the book is already becoming physically a little unmanageable, and one fears to anticipate the next edition embodying the proposed legislation, unless a different size or a division into two volumes is adopted. Since the eighteenth edition was published a year ago there has been no direct new licensing legislation to digest; yet the statute book was not entirely empty, even during the 1907 session, for the Army Act of that year made a change in the billeting law, and the Public Health Acts Amendment Act invested local authorities in districts where the Act is in operation with power to order the provision of sanitary conveniences in public houses—and both of these enactments are duly noted in the new edition. But if Parliament has been content with two small changes in the licensing law, the Courts have not been idle. The House of Lords' decision in *Leeds Corporation* v. *Ryder*, and the Divisional Court's decision in *Liverpool Corporation* v. *Walker* are important interpretations of hitherto unsettled points arising under the 1904 Act; and both are copiously noted in the volume before us, as are other recent decisions, illustrating the painstaking thoroughness with which Mr. Mackenzie does his editorial work. Of course Paterson is a book for reference rather than perusal—(and the careful and exhaustive index makes it excellent for that purpose)—and it is a book for the practising lawyer rather than the layman; yet in view of the peculiar circumstances surrounding licensing law at the present time, one would like to see it in the possession of others just now. If every politician and publicist who is actively canvassing the subject could be forced to pass an examination in Paterson before speaking or writing upon the licensing question, we should be spared many half-digested ideas, and perhaps a certain amount of undiluted nonsense. We should not, for example, have a lady, conspicuous in a section of social reform, urging that justices who have a proprietary interest in the trade should not adjudicate upon licensing matters. We might even be saved the speeches of Members of Parliament who declare that the publican's business ought to be regulated by law—a statement

actually made at a public meeting not many months ago. And if only statesmen could be forced to wade through the book there might be some hope for the long overdue codification of the licensing law. Mr. Mackenzie has done his best to elucidate and arrange; but what a tangle it is, even then!

E. E. W.

A Digest of English Civil Law. By EDWARD JENKS (editor), W. M. GELDART, W. S. HOLDSWORTH, R. W. LEE, J. C. MILES. Book II. Part II. Law of Contract (Particular Contracts) by R. W. LEE. London: Butterworth & Co. 1907. xxxi and 313 pp. (5*s.* net per part.)

MR. JENKS and his colleagues maintain the high reputation already obtained by their attempt to codify English Law. We wish here to dwell solely upon the benefits which judicious readers may obtain from the 'Digest of English Civil Law.' The book, in the first place, provides a bold and, on the whole, accurate statement of the general principles which underlie large departments of the private law of England. Our own doubt as to the prospect of Mr. Jenks and his fellow writers being completely successful in their endeavour turns on the point whether they confine themselves closely enough to laying down the general principles of the topics with which they deal. We are not, for instance, sure whether the thirty-seven articles comprised in *Title* v. *Principal and Agent* might not with advantage be reduced in number. The book, in the second place, does far more than merely supply readers with general statements as to the rules governing particular branches of the law of England; it enables them to see that the law really does consist of a body of principles. We feel, however, that something would be gained if our authors had made a greater effort to force upon the observation of students the fact that every proposition of law must either state some broad general rule, or else indicate a real or apparent exception to such a rule. To teachers of law, in the third place, the 'Digest of English Civil Law' will, we are convinced, become, as it advances to completeness, of more and more value. It gives at any rate an outline or sketch of English law of which a competent teacher can by thought and study fill up the details. The last service of the work not only to teachers, but to students, is that it reduces English law to propositions which it is possible definitely to discuss. The 334 articles of which the last volume consists are assuredly for the most part the expression of well-established legal rules. It is impossible, however, but that some of these 300 and odd propositions should be either inaccurately expressed or in some cases of doubtful soundness; for that is probably the case with some of the authorities on which they rest. But every one of them is intelligible. Each of them raises a perfectly clear issue. Each of them either commands assent or excites dissent. No student can do better than accept the challenge offered him by Mr. Jenks and his colleagues, and through the reading of reported cases enable himself to give, in his own mind at least, a clear verdict as to the correctness of the opinions propounded. From an intellectual conflict of this kind the authors of the 'Digest of English Civil Law' would, we feel confident, come out with great credit. It is certain that the stirring up of the sort of thorough-going debate we contemplate would vastly extend the knowledge of English law. Vagueness of statement originating, as it generally does,

in confusion of thought, is the foe with which every teacher and student of law has to contend. Authors who exhibit the principles of law in clear propositions admitting of definite assent or definite denial render an inestimable service to every man who cares that the law of the land should be studied with intelligence. To stimulate rational controversy is at bottom the same thing as the propagation of sound knowledge. The Anglo-Indian Codes, with all their inequalities of workmanship and occasional deliberate departures from the Common Law, have been found by some students in their early days more profitable than ordinary textbooks, for the reasons pointed out above. A skilfully framed digest of purely English law should be of still greater use: provided always—to repeat a warning we do not scruple to repeat on every convenient occasion—that it is used as a guide to the ultimate authorities and not as a substitute for them.

Negligence in Law. By THOMAS BEVEN. Third Edition. Vol. I. General Relations; Vol. II. Special Relations arising out of Contract. London: Stevens & Haynes. La. 8vo. cciv, 1–726; xi, 727–1505 pp. (£3 10*s*.)

THE fact that a work of this magnitude has reached a third edition in a comparatively short time, not being one of the books that profess to make things easy for idle students or ignorant practitioners, is more eloquent than any commendation of ours. Mr. Beven deals with law which is often uncertain, and he cannot make it certain; but seldom, if ever, will it be any one's fault but our own if we do not obtain from him, anywhere within his extensive scope, the fullest means of forming a probable opinion.

There is a good deal of alteration in this edition besides the necessary dealing with new cases. Less attention is given to American decisions and more to 'the Law Reports of our greater Colonies.' By the way, Mr. Beven does not seem to have noted that one 'Mr. Holmes,' who wrote a book on the Common Law, is now Justice Holmes of the Supreme Court of the United States; and we think he would be less exercised by the multitude and occasional vagaries of American authorities if he had more rigorously applied the maxim *non numeranda sed ponderanda* to his consideration of them. One case which puzzles him in the preface may be explained by the fact that the conductor of an American train has larger powers and duties than an English guard. He is not penned in a van, but has the run of the train, and is answerable for keeping order. If, therefore, he assaults a passenger, it is not a collateral 'frolic of his own,' but a direct breach of his duty. And so the Court appears to have thought.

Mr. Beven also calls attention in the preface to his strictures on *Stanley* v. *Powell* [1891] 1 Q.B. 86, which remain unchanged. We agree with him that the judgment, standing alone, is inconclusive. But the importance of the case is that it has been accepted, in the result, as a denial of the old-fashioned doctrine (once in fashion whether really authoritative or not) that a man is generally liable in trespass for all harm ensuing from his voluntary act, though the act itself were lawful and free from both unlawful intent and negligence; this, of course, apart from any question as to remoteness of damage or any special disqualification of the plaintiff in the circumstances.

We humbly conceive that some of Mr. Beven's distinctions are too ingenious for this world, or those parts of it in which law has to be explained off-hand to juries; for judges, even if they are as learned as Mr. Beven, cannot always remember all they know. But he is fully entitled to be as dialectic as he pleases, for, though he puts his opinions forcibly, he does not dogmatize.

One little critical question: why does Mr. Beven ignore Krüger and Mommsen and cite the Corpus Juris from seventeenth-century editions? Not that the difference can often matter for his purposes, but it looks somewhat out of keeping in a writer so scholarly.

Legal Essays. By [the late] JAMES BRADLEY THAYER. Boston, Mass.: The Boston Book Co. 1908. 8vo. xvi and 402 pp.

THESE collected essays—of which some are reprinted from publications not usually consulted by lawyers—will be welcome to all readers who appreciate the late Prof. Thayer's combination of exact learning with elegance in the best sense.

As might be expected, the prevailing topics belong to the heads of constitutional law and evidence. In the first essay it is explained that the 'American doctrine which allows to the judiciary' (not the Supreme Court of the United States or Federal Courts exclusively, as sometimes supposed in England) 'the power to declare legislative acts unconstitutional, and to treat them as null' was much disputed in more than one jurisdiction before it prevailed. There was a rival doctrine that every branch of the government was the proper judge of the constitutionality of its own acts. And even now it is held that before a Court disregards a statute it must be not only satisfied, but clearly satisfied, that the enactment is contrary to the constitution of the United States, or the particular State, as the case may be. Later in the volume, in the course of an elaborate discussion of the *res gesta* question, there is a note which should be profitable for English readers, pointing out that the Supreme Court of the United States is not an authoritative interpreter of the common law for the purposes of the several State jurisdictions.

The short paper on 'Trial by Jury of Things Supernatural' shows how an atmosphere of epidemic delusion could make rules of evidence a snare and trial by jury an oppression, the only safeguard being found in judges like Lord Holt who did not abandon their common sense. Prof. Thayer seems to have thought that certain clouds of superstition (less pernicious than the belief in witchcraft) had gathered round the Constitution of the United States in the matter of the Philippines.

Frederic William Maitland: two lectures and a bibliography. By A. L. SMITH. Oxford: Clarendon Press. 1908. 8vo. 72 pp. 2*s.* 6*d.* net.

THIS is a tribute to Maitland's work from a lifelong worker in the History School of Oxford. As such it is welcome, and especially to Cambridge men. Mr. A. L. Smith's cordial appreciation leaves in substance nothing to be desired. We cannot all expect to agree in the order of merit we assign to Maitland's writings, and therefore the present reviewer notes merely as his personal taste that he puts the Rede Lecture on English

Law and the Renaissance among the first. Mr. A. L. Smith says nothing of it (at least, nothing of his own), and in the bibliographical appendix its name is misprinted as the 'Bede' lecture. There is just one real matter of difference. On behalf of the Common Law we cannot assent to the rather patronizing tone of History as represented by Mr. A. L. Smith. He seems almost to think of the Faculty of Law as a kind of Gehenna from which deserving brands are plucked, ere they be too dry, to adorn the Paradise of History and flourish there as green trees. Now Maitland was a good lawyer before he was a historian; no one who was not a good lawyer could have done his historical work; and he never ceased to be zealous for the law. Some purely legal lectures of which no part is yet in print will, we believe, shortly prove this better than any other man's word. Mr. A. L. Smith asks, near the end, 'What did Maitland mean by choosing for his epitaph, *Hic iacet persona ficta*?' We have no doubt what he ought to have meant, though the answer may be hardly consistent with Maitland's almost excessive shrinking from self-assertion. To us it means that, if he did not start the hunt of that monstrous beast the Fiction Theory of the corporation, he was the first English scholar to join in the adventure, and lived to be well in at the death.

An Encyclopaedia of Forms and Precedents other than Court Forms, by Eminent Conveyancing and Commercial Counsel. Under the general editorship of ARTHUR UNDERHILL, assisted by HAROLD B. BOMPAS, HUMPHREY H. KING, F. G. UNDERHAY, and W. M. CROWDY. Vol. XII. Sale of Land; Vol. XIV. Shipping Documents to Tramways. London: Butterworth & Co. 1907, 1908. La. 8vo. lxxxvii and 981 pp. and xlv and 661 pp.

VOLUME XII, which discusses the sale of land, is perhaps the most useful volume of the work. The preliminary note, which is divided into two heads, (1) the Contract and (2) the Assurance, is very good. At p. 29 will be found a list of corporations who can buy and sell land and a statement of the formalities necessary to make the transaction valid.

The list of searches which ought to be made by a purchaser at p. 115 appears to be accurate. We may, however, point out that searches in the registry at Durham cannot be made, as that Registry has been closed for many years, and that as searches for *lis pendens* of land in Lancashire are sometimes registered in the District Register at Liverpool, searches in that Registry should be made if the land is in Lancashire. The discussion at p. 129 as to what matter should be recited is one which should be carefully considered by young practitioners. Nothing is more aggravating to a person perusing a deed than to find long recitals of irrelevant facts, and, on the other hand, the absence of relevant recitals may render it difficult to understand the effect of the operative part of the deed.

Under the heading 'Agreements for Sale' will be found a large number of precedents.

At p. 152 the editors express an opinion that trustees selling land are not at liberty to sell the timber on it at a valuation. While perhaps it may be difficult in theory to defend a sale made in this manner, it is the only possible manner of arriving at the true value of the timber. Where the quantity of timber is but small, it is common to sell it with the land as a whole, but where it is large it is impossible for a purchaser to

estimate its value without having it valued, and the validity of a sale by trustees of timber at a valuation will probably be upheld if the question ever comes before the Court, on the grounds both of expediency and of its having been a long established practice.

At p. 172 a note correctly states that evidence accepted by conveyancers as to the age of a person (and we may add as to many matters of pedigree) is not always, or necessarily, admissible in Court, a point which requires more attention than is given to it by most practitioners.

The forms of Agreements for Sale of land will be found at pp. 151 et seq. The only criticism that we can make on them is that they do not point out the variations required where the land is registered, or is situated in a district where registration is compulsory. We presume, however, that they were purposely omitted in this place as they will be found in the Special Conditions.

The General Conditions of Sale, pp. 275 et seq., provide for most of the usual cases. The special conditions occupy nearly 200 pages; conditions for use on a sale of land where registration is compulsory will be found at p. 446; those for use on a sale of registered land will be found at p. 447 et seq., and an outline form will be found at p. 444. We do not find in the conditions for sale in a compulsory district any provision providing that the purchaser shall cause notice of restrictive conditions to be entered on the register, a condition which, at all events, if the sale is the occasion on which the restrictions are imposed, should always be inserted.

We doubt whether the condition as to Provisional Registration at p. 457 is correct. It provides that the purchaser shall receive a transfer delivered as an escrow. The proper course appears to be for the vendor (not the purchaser) to present the transfer for provisional registration of the purchaser.

The conveyances are divided into (*A*) assurances of freeholds comprising conveyances (1) by and to persons of full capacity, (2) by and to persons under disability, (3) under orders of Court, (4) of mortgaged property, (5) in consideration of or subject to rent-charges, (6) by and to trustees and personal representatives or heirs of deceased persons, (7) under the Settled Land Acts 1882 to 1890, (8) subject to restrictive covenants, (9) by and to limited companies and corporate bodies, (10) of lands of qualified freehold tenures; (*B*) copyhold assurances; (*C*) leasehold assurances made (1) by absolute owners, (2) by tenants for life, (3) by mortgages, (4) by persons in fiduciary positions and co-owners; and (*D*) mixed assurances.

In the space at our disposal it is impossible to give an adequate account of these precedents. We may call attention to the precedents at p. 539 et seq. of conveyances on behalf of a lunatic and a convicted felon.

The editors have been very fortunate in obtaining a few precedents settled by the late Mr. T. C. Wright, one of the founders of the modern school of conveyancing, a draftsman who, at a time when the prolix conveyances of the old school were still pretty generally employed, was distinguished by the clearness and conciseness of his drafts.

Volume XIV contains the headings Shipping Documents, Stock Exchange Documents, Testimonium and Attestation Clauses and the Execution and Authentication of Instruments, Theatres, Tithes and Tithe Rent-charges, Trade Combines, Trade Marks, Trade Unions, &c., and Tramways.

Under the heading Stock Exchange Documents will be found a full and lucid description of the manner in which stocks or shares are bought and sold on the London Stock Exchange. The meaning of some words not

generally known to the public, such as Contango Day, Ticket Day, Settling Day, Certified Transfer, Carrying-over, and Backwardation are carefully explained.

The forms are forms for the use of brokers, and indemnities to companies on the issue of a share certificate or a dividend warrant in place of one that is lost, and memoranda as to mortgages of stocks and shares.

The preliminary note to Testimonium, &c., contains full directions for execution of deeds in England (including special cases); for attestation (including special cases), for the execution abroad of documents to be acted on in England, and for the execution and authentication of documents to be acted on out of England. We may call special attention to the formalities necessary when the instrument is to be acted on in Scotland.

The preliminary note on Theatres contains much information concerning the law affecting theatres and theatrical performances which is not, so far as we are aware, generally known to the profession. The forms contain a lease of a theatre, agreements for a tenancy of a theatre, with a touring company, with a refreshment contractor, and a mortgage of a theatre in course of erection. There are also many documents relating to the play and the performance.

The preliminary note to Tithes and Tithe Rent-charges contains an epitome of the law relating to them; and the precedents appear to contain all the forms which can be required in practice.

Under the heading Trade Combines will be found discussions of the legality of combines as regards third parties, and as regards the parties thereto, and a considerable number of precedents.

Under the heading Trade Marks will be found a preliminary note, the forms required for registration of a trade mark, forms of assignment of trade marks, and for registering the assignment.

Under the heading Trade Unions, &c. (which has the advantage of being written by the Secretary of the Royal Commission on Trade Disputes and Trade Combinations 1903–1906) will be found a useful epitome of the law and a collection of precedents.

While the practitioner will not find much in this volume relating to his ordinary practice, he will find it extremely useful when he has to deal with the subjects treated of in it.

A Supplement to a Treatise on the System of Evidence in Trials at Common Law, containing the Statutes and Judicial Decisions, 1904–1907. By JOHN HENRY WIGMORE, Professor of the Law of Evidence in the Law School of North Western University. Boston: Little, Brown & Co. 1908. La. 8vo. xiii and 459 pp.

NOT content with the four large volumes on the Law of Evidence, recently published, Professor Wigmore has now produced a supplementary volume of 459 pages, which contains the Statutes and Judicial Decisions for 1904–1907, as well as many additional cases which had been omitted from the earlier volumes. The arrangement of this Supplement strikes us as admirable. It follows the former volumes paragraph by paragraph, so that by comparing any paragraph in the original treatise with the paragraph in the Supplement which bears the corresponding number, the reader is at once placed in possession of all that Professor Wigmore has

been able to discover about the particular point upon which information is being sought. The learned author does not content himself with merely recording the decisions of the various Courts, but where those decisions do not commend themselves to his better judgment he very properly does not fail to criticize them. For example, upon page 9 we find collected a series of rulings which he says 'are to be numbered among those which still take part in the Saracenic invasion led by Fanatic Technicality into the realms of Truth and Common Sense.' We are glad to see that he puts forward an earnest plea for the 'orthodox and unflinching rule of the inherited Common Law—the Judge for admissibility, the Jury for weight.' Among the recent English cases cited we notice *R.* v. *Watt* (1905) 20 Cox 852, which Professor Wigmore describes as 'a good opinion by Phillimore J.' It may be interesting to Professor Wigmore to know that before Mr. Justice Phillimore gave his decision on the point which arose in *R.* v. *Watt*, he had been referred to paragraphs 278 and 279 of the Main Treatise.—The cases following *R.* v. *Lillyman* [1896] 2 Q. B. 167, are brought up to date on page 169, and on page 75 some further cases have been added with reference to the English practice as to confessions under arrest. The Index of Topics, which is the work of Mr. Harvey C. Voorhees, of the Boston Bar, appears to have been carefully compiled, and the system of reference adopted clearly shows where any particular point can be found both in the Main Treatise and the Supplement. In our July number for 1905 we congratulated Professor Wigmore on the completion of a task of great magnitude, but although 'of making books there is no end,' we do not think that much study of this Supplement should prove 'a weariness of the flesh.'

Encyclopaedia of Local Government Law. Edited by JOSHUA SCHOLEFIELD. London: Butterworth & Co., and Shaw & Sons. Vol. V: 1907. La. 8vo. lxiv and 468 pp. Vol. VI: 1908. La. 8vo. xci and 558 pp. (25*s.* each vol.)

THESE volumes contain long articles on many subjects of importance, including Officers of Local Authorities, Overseers, Parish Councils and Parish Meetings, Police, Private Streets, Rating, Reformatory and Industrial Schools, Registration of Births, Deaths, and Marriages, Rivers, Schools, Sewers and Drains, Small Holdings, Summary Proceedings, Tramways, Vaccination, and Vestries. There are also many shorter articles, not less valuable than the longer ones, and often more valuable from the fact that they deal with the matters too small to form the subject of independent textbooks and yet too special to find their way into general law books.

Such minor articles as those on the Board of Trade, Lights on Vehicles, Telegraphs and Telephones, Sky Signs, Slaughter-houses, Servants' Registries, Postal Facilities, Petroleum and Provisional Orders, are just what one looks for in an Encyclopaedia. They direct the reader at once to the statutes and case law on the several subjects, and save him a prolonged, and sometimes fruitless, search in the Index to the Statutes and Digests of Case Law.

The longer articles are no doubt equally useful to those who are not provided with, or have not ready access to, a well-furnished library; but

they cannot take the place of the treatises specially devoted to the same subjects.

An inevitable defect in an Encyclopaedia of law is the difficulty of keeping it up to date. Some articles may become obsolete before others have left the press. This has happened in the case of 'Allotments and Small Holdings.' The article by that name in vol. i is rendered to a large extent obsolete by the passing of the Small Holdings and Allotments Act, 1907. Fortunately the editors have been able to remedy the defect by inserting in vol. vi an article on 'Small Holdings and Allotments,' which shows how the law stated in the earlier article has been amended by the recent Act.

A notable article in vol. vi is that on 'Pollution and Obstruction of Rivers,' by the editor. The Statute Law is very fully dealt with, and even the local Acts relating to rivers' pollution in Yorkshire and Lancashire are treated exhaustively. We are not sure that some of the space devoted to these local Acts might not with advantage have been utilized for a fuller treatment of the Common Law. The acquisition of prescriptive rights to pollute rivers, liability for adding to the pollution of an already impure river, rules as to coming to the nuisance, the application of the Statute of Limitations and Public Authorities Protection Act to nuisances by pollution, are all treated of either inadequately or not at all, and *Crossley* v. *Lightowler* is not even mentioned. In the section on 'Remedy by Abatement' it is not stated whether notice must be given before abating (see *Lemmon* v. *Webb* [1895] A.C. 1), and the Common Law remedy by action for damages is spoken of as if it owed its existence to Lord Cairns's Act.

One of the longest articles in vol. v is that on 'Rates and Rating,' by Mr. E. M. Konstam. The law is stated clearly and as a rule accurately. The learned author, however, hardly does himself justice in the section devoted to 'Rating Markets.' If he had kept in mind that it is the market-place and not the market that is rated, and had carefully studied Mr. Chitty's accurate exposition of the law in vol. iv (p. 473) of this Encyclopaedia, he would not have felt any difficulty in reconciling *Duke of Bedford* v. *Covent Garden* (51 L. J. M. C. 41) with *Reg.* v. *Caswell* (L. R. 7 Q. B. 328) and *Mayor of London* v. *St. Sepulchre* (L. R. 7 Q. B. 333 n.). We cannot agree with him that the Covent Garden case has shaken the authority of the earlier cases. The Covent Garden case was one in which the tolls were taken under a local Act, and the question was whether they were really market tolls or stallages. The Court held that they were stallages, taken in respect of an occupation of a definite portion of the market-place, and not (as in *Reg.* v. *Caswell*) tolls payable in respect of the use of the market. In *Reg.* v. *Caswell*, Lush J. put the point in one sentence: 'The question is whether these cattle market tolls are a payment for the use of the market only, or for the use of the soil.' They were held to be of the former nature. In the Covent Garden case the tolls were held to be payable for the use of the soil. Whether the market is held in a public street or an enclosed market-place is quite immaterial. In either case, if the payment is made merely for selling or exposing goods for sale in the market, and not for any occupation of a definite portion of the soil of the market-place, the toll is a franchise toll payable in respect of the user of an incorporeal hereditament, and cannot be taken into account in the assessment of the market-place.

A Digest of Cases overruled, approved or otherwise dealt with in the English and other Courts. By W. A. G. WOODS and JOHN RITCHIE. (Founded on Dale and Lehmann's Digest of Cases overruled, &c.) Three Vols. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1907. La. 8vo. ccxxxii pp. and 5592 columns. (£5 5*s.*)

FEW people would recognize the old Dale and Lehmann in these three volumes. The plan and execution of the work are quite different, and the old book (not always reliable) has evidently served merely as a foundation for this massive edifice containing references to some 30,000 decisions. The present work is arranged according to subject-matter, and gives (as explained in the Preface) 'such extracts from the judgments as will show the special point discussed in each case. We have thus collected together under their proper headings those cases in which a given case is specially discussed, approved, &c., and have so arranged them that the inquirer may see at once not only how that case itself has been treated, but also how the cases treating it have been subsequently handled.' Every case is dated, and references to all reports of each decision are given. There is a complete table of cases, and the appendix brings the work down to the end of 1906. So far as we have tested the work, it seems to have been carefully and accurately done, and we have no substantial criticism to make; but the system of double dates, necessitated by the placing of the Law Journal references before those to the Law Reports, looks rather clumsy.

This reincarnated 'Dale and Lehmann' should be useful to the busy practitioner. It will at once put him on the track of all the important decisions on a given point.

The Principles and Practice of the Law of Libel and Slander. By HUGH FRASER. Fourth Edition. London: Butterworth & Co. 1908. lv and 409 pp. (12*s.* 6*d.*)

THE fourth edition of this useful book does not call for lengthy comment. No change has been made in the general arrangement, but the whole work has been carefully brought up to date. The recent decisions in the Court of Appeal have necessitated the re-writing of that part of the book which deals with the law of Fair Comment. The author continues to take the view that Fair Comment is no libel, which must now be regarded as doubtful. The decision, however, in *Plymouth Mutual, &c.* v. *Traders Publishing Association* [1906] 1 K. B. 403 is not cited, except in connexion with pleading and discovery, and scant attention is paid to the judgment of Lord Collins in *Thomas* v. *Bradbury, Agnew & Co.* [1906] 2 K. B. 627. Considerable additions have been made to the Appendix of Forms and Precedents, particularly of affidavits required in the various proceedings that may arise in the publication of a libel. A novel and useful feature is a precedent of a complete case on appeal to the House of Lords.

A Treatise on the Law relating to the Devolution of Real Estate on Death under Part I of the Land Transfer Act, 1897, and the Administration of Assets, Real and Personal. By the late LEOPOLD GEORGE GORDON ROBBINS and FREDERICK TRENTHAM MAW. Fourth Edition. London: Butterworth & Co. 1908. 8vo. lxviii and 474 pp. (15*s.* net.)

CONSIDERING the slovenly way in which Part I of the Land Transfer Act, 1897, is drawn, the number of reported cases on it is surprisingly small, but such as have been decided since the last edition of this work was published are important, especially *Re Somerville and Turner's Contract* [1903] 2 Ch. 583, deciding that equitable estates are within the Act; *Re Cohen's Executors and London County Council* [1902] 1 Ch. 187, deciding that executors not entitled to probate in England are not 'personal representatives' within the meaning of the Act; *Re Beverley* [1901] 1 Ch. 681, with reference to an executor's power of appropriation; *Re Williams* [1904] 1 Ch. 52, with reference to his right of retainer; and *Re Kempster* [1906] 1 Ch. 446, as to a legatee's right of marshalling. All these are duly referred to in the new edition.

In the earlier editions of the book there was a difference of opinion between Mr. Robbins and Mr. Maw on the question whether on the death of a tenant in tail his estate devolves to his personal representatives, Mr. Robbins thinking that it does, and Mr. Maw thinking that it does not, because the heir in tail takes by 'survivorship.' In the new edition Mr. Maw has abandoned this somewhat strained interpretation, and thinks that an estate tail is not within the Act because it is not devisable, and this is probably correct, having regard to the words 'notwithstanding any testamentary disposition' in section 1.

The remainder of the book, dealing with administration of assets, &c., gives a good summary of the law, and all the recent cases appear to be noted up. Mr. Maw thinks that as a result of the recent decisions in *Re Leng* and *Re Whitaker*, Crown debts no longer have priority where an insolvent estate is being administered by the Court. This view seems to us to be correct, but the point is not free from doubt. Mr. Maw also thinks that as a result of the decision in *Re Samson* [1906] 2 Ch. 584, the Crown is entitled, in respect of a simple contract debt, to priority over all specialty and simple contract creditors, and that the decision in *Re Bentinck* [1897] 1 Ch. 673 is therefore erroneous. This seems a necessary consequence.

The new edition is a great improvement on its predecessor, and forms a useful and trustworthy guide.

Exterritoriality: the Law relating to Consular Jurisdiction and to Residence in Oriental Countries. By SIR FRANCIS PIGGOTT, Chief Justice of Hong Kong. New Edition, revised and enlarged. Hong Kong: Kelly & Walsch, Lim.; London: Butterworth & Co. 1907. La. 8vo. xxi and 326 pp. (21*s.*)

THE learned author gives a good introduction to the subject, showing how interest in it has grown since the time when Sir James Stephen described exterritoriality as a subject 'of great curiosity, but very little known.' It is pointed out that exterritoriality is not the same thing as extra-territoriality, though some writers consider the terms as identical. The whole question is treated from the point of view of the eastern countries, where, since Japan has taken her place among the great Powers, many international

questions have gained a wider bearing. Justice is done to the China Orders in Council, which are too little known and seldom read, the care which is involved in their elaboration having been hitherto hardly appreciated. The book is admirably indexed, and contains several excellent tables referring to the statutes, cases, orders, &c., quoted in the rest of the work. It will not only prove a valuable book of reference to consuls and all other members of the consular and diplomatic services, but also to all international lawyers. A very important treaty with Japan, which came into force in August 1899, and which has recently been brought into notice in the courts (*Marshall* v. *Saville otherwise Marshall*), is, we think, insufficiently dealt with. It is shortly referred to at p. 268, but is not mentioned in the Table of Treaties. The importance of this treaty may be gathered from the fact that it appears that forty English marriages in Japan have been declared invalid through the non-observance of the new provisions. Otherwise, the work seems to be well brought down to date.

The Companies Act, 1907, *and the Limited Partnerships Act*, 1907, with explanatory notes. By Sir Francis Beaufort Palmer. London: Stevens & Sons, Lim. 1908. 8vo. viii and 102 pp. (6*s*.)

The Companies Act, 1907, is one which sadly needs an interpreter of authority, for it touches company law at nearly every point, and will certainly provide the Courts with many puzzles. And what better interpreter could we have than Sir F. B. Palmer with his experience of every phase of company law, and himself a member of the Committee which sat and 'hatched,' as King James would say, the Report on which the Act is founded? One of the sections which is clearly destined to give much trouble is that authorizing the reissue of debentures (s. 15). On this the author has a long and illuminating note. Another, not less important section is that giving a statutory definition of a 'private company'; and its importance, as the author points out, consists in the fact that few so-called 'private companies'—and their name is legion—conform to the requirements of the definition, and most of them are therefore not entitled to the privileges and immunities accorded only to the 'private company' as statutorily defined. There will have to be an extensive altering of articles to bring these other private companies into line with the Act.

The volume includes the Limited Partnerships Act, 1907, and one of the most instructive things in it is the comparison which Sir F. Palmer institutes in the Introduction to the Act between the respective merits of the 'private company' and the limited partnership. They cannot be gone into here. Suffice it to say that the author's conclusion is altogether in favour of the private company.

The Law relating to Banker and Customer in Australia. By F. A. A. Russell. London: Sweet & Maxwell, Lim.; Sydney: Law Book Company of Australasia, Lim. 1907. 8vo. xv and 392 pp.

This book is based upon lectures delivered in Sydney before the Bankers' Institute of New South Wales, and therefore deals primarily with banking law as it is in New South Wales. But banking law, including the law relating to negotiable instruments, is much the same throughout Australia

and New Zealand, and each State has its own Bills of Exchange Act modelled on the English Act of 1882. References are made from time to time to the differences in the local statutes, and this will make the book useful in other parts of Australia than New South Wales. Lawyers and others in England who are interested in Australian banking law will also find it possible to resolve many points of law and banking practice by looking into Mr. Russell's book. The author's claim for his work that it deals more fully than legal textbooks usually do with the practical routine business of banking is entirely justified, and bank clerks and others in the service of a bank in England will find many legal questions here discussed in a way which they will be able to understand. Several recent cases are fully discussed, such as *Capital and Counties Bank* v. *Gordon* and *Marshall* v. *Colonial Bank*. Some common mistakes among business men are most usefully pointed out, as for instance (p. 260) as to any special efficacy attaching to a particular method of referring to the fact of agency where a business document is signed on behalf of a principal.

Money-lenders and Borrowers. By C. Grenville Alabaster. London: Stevens & Sons, Lim. 1908. 8vo. xxiii and 119 pp. (6*s*.)

This book contains, first, an explanation and interpretation of the Money-lenders Act, 1900; and, secondly, some notes on the position of sureties and the methods of procedure for the recovery of money lent. The former is all that will appeal to legal practitioners. The case of *Wade* v. *Shaffer*, 'Times' Newspaper, June 25, 1907, is mentioned, in which Parker J. held that the substantial question in proceedings for relief under the Act is whether the transaction is harsh and unconscionable or no, and not whether the borrower has tendered or paid into Court the amount eventually adjudicated to be due from him. Costs were given to the borrower upon that principle. A chronological table of statutes is perhaps more convenient for reference than an alphabetical list.

The Weights and Measures Act. By W. Eric Bousfield. London: Stevens & Sons, Lim. 1907. 8vo. xxx and 300 pp. (6*s*.)

This work comprises the statutes relating to weights and measures, including those affecting Scotland and Ireland. It also contains the Statutory Regulations issued by the Board of Trade in 1907. Appended to the various sections are notes incorporating the judicial decisions thereon, and also explanatory observations where they appear necessary.

The author has been unusually fortunate in the amount of intimate knowledge and experience which has been at his disposal. Mr. W. R. Bousfield, K.C., who introduced the measure of 1904 into the House of Commons, has written a preface, and has assisted the author in the preparation of the work. Assistance has also been given by various gentlemen who aided in the preparation of the Statutory Regulations. The work has been carefully prepared, and it contains a lengthy Introduction elucidating the subject. The index is good, but scarcely exhaustive. Such words as 'consent,' 'false,' and 'unjust' might have been accorded separate notice in view of the judicial decisions upon them.

The Yearly Digest of Reported Cases for the Year 1907. Edited by G. R. HILL. 1908. London: Butterworth & Co. 8vo. xxxi and 236 pp. (15*s.*)

THIS annual publication maintains its standard of excellence. It digests the cases of the past year which are reported in the Law Reports, the Law Journal, the Law Times Reports, the Times Law Reports, the Solicitors' Journal (when not reported elsewhere), Commercial Cases, Maritime Law Cases, Manson's Bankruptcy and Company Cases, the Reports of Patent Cases, Registration Cases, Cox's Criminal Law Cases, Local Government Reports, O'Malley and Hardcastle's Election Petition Reports, M'Namara's Railway and Canal Cases, and a selection of Irish and Scotch Reports. But it still omits to refer to cases in the Weekly Notes, and notes of cases in the Law Journal and Law Times, which are not reported elsewhere, and this omission is a defect.

Principles of Company Law. By ALFRED F. TOPHAM. Second Edition. 1908. London: Butterworth & Co. xxxvi and 357 pp.

THIS is a handy little book, most useful for students. The recent cases and the provisions of the Companies Act, 1906, are for the most part duly noticed in their proper places. At page 208, the author gives, as one of the grounds for winding up a company, that the number of its members has fallen below seven, but he should have gone on to say, 'unless it is a private company within the meaning of the Act of 1907, in which case the number must have fallen below two.'

We have also received:—

Encyclopaedia of the Laws of England . . . Second Edition, revised and enlarged. Edited by MR. JUSTICE A. WOOD RENTON and MAX A. ROBERTSON. Vol. IX. Mark to Non assumpsit. London: Sweet & Maxwell, Lim. Edinburgh: Wm. Green & Sons. 1908. La. 8vo. vii and 686 pp.—Like the preceding volumes, this has been well posted up. The article on Martial Law, now signed by Mr. S. H. Leonard, is much enlarged, and deals with the questions which arose in the South African War. Recent events in the domain of international law, such as the settlement of the North Sea incident and the additions of the Second Peace Conference at the Hague to the machinery of arbitration and mediation, are accounted for in the appropriate places (in one or two there seems to have been barely time to insert extracts without comment). There is a full and practical article on motor-cars.

There is one unlucky misprint in the article on Marriage, where we read of 'the famous phrase *volumus leges angliae mutari.*' It is of more importance, however, that the decision of *Ogden* v. *Ogden* in the Court of Appeal has been worked in, though it was impossible to refer to the regular report, which had not yet appeared.

Woodfall's Law of Landlord and Tenant. Eighteenth Edition. By the late J. M. LELY and W. H. AGGS. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1908. La. 8vo. lxxv and 1188 pp. (38*s.*)—We note the appearance of the new edition of 'Woodfall.' It has been completed by Mr. W. H. Aggs, Mr. Lely having died while the book was in progress.

This edition has undergone considerable revision, and references to some 214 new cases have been added. As with nearly all textbooks, its bulk increases steadily. This edition is some thirty pages larger than its predecessor. In future one or two pages might be saved by omitting the original author's preface, a poor specimen of perhaps the very worst period of English prose; and more, we suspect, by weeding out obsolete, superfluous, and otherwise useless authorities. The Agricultural Holdings Act, 1906, and the Small Holdings and Allotments Act, 1907, are fully dealt with, and all material statutes and cases are brought down to Michaelmas, 1907. The Preface states that 'a large majority' of the cases have been dated. Surely if it was thought advisable to date any it would have been worth while to do the work thoroughly, for modern cases at any rate.

The Principles of Equity, intended for the use of Students and of Practitioners. By EDMUND H. T. SNELL. Fifteenth Edition by ARCHIBALD BROWN. London: Stevens & Haynes. 1908. 8vo. lvii and 774 pp. (21*s.*)—This edition of Snell has been carefully brought up to date. The work has been further simplified by the division of the text into shorter paragraphs. Otherwise we do not observe any attempt to introduce anything like scientific method, or to make the book intelligible to a student who does not already know a good deal of law, and we assume that the learned editor has deemed it impossible. Here is a specimen paragraph: 'An infant even may become a partner. Also a partner may have the right of nominating his successor in the partnership.' Two recent cases are cited for these two propositions—absolutely unconnected, by the way, save that there are partners in both—without the slightest hint to the student that both were elementary law before either reader or writer were born. 'An infant' or other student 'even may' on this occasion do worse than follow the common and generally reprehensible practice of learning the proposition in the text by heart and not troubling himself about the authority.

Two Studies in International Law. By COLEMAN PHILLIPSON. London: Stevens & Haynes. 1908. 8vo. 136 pp. (5*s.* net.)—The main subjects are (1) 'The influence of international arbitration on the development of international law,' with subdivisions on arbitration schemes, arbitral procedure, and the historical arbitrations of the nineteenth century; (2) 'the rights of neutrals and belligerents as to submarine cables, wireless telegraphy, and intercepting of information in time of war.' Mr. Phillipson's studies are neat and concise, and accurate so far as we have observed. He has added supplementary notes on the Hague Conference of 1907. Summary though it is, the book contains several profitable things not yet digested by the text-writers. Prof. Holland's paper on Neutral Duties in a Maritime War and Sir E. Fry's on the Rights of Neutrals (in vol. ii of the Proceedings of the British Academy) should be added to the 'short bibliography' of the Second Essay. Pufendorf's so-called suggestion that an arbitrator between sovereigns should follow the law of nature (p. 18) expressed only what appeared a truism to all publicists of his time and for some time afterwards. Accordingly he said 'manifestum est.' 'The law of nature and of nations' may still be heard of in Scotland. The French *compromis* is not properly rendered by 'compromise.' But these are very small matters.

The Procedure of the House of Commons. By JOSEF REDLICH. Translated from the German by ERNEST STEINTHAL, with an introduction and a sup-

plementary chapter by SIR COURTENAY ILBERT. London: A. Constable & Co. 1908. 3 vols. La. 8vo.—This excellent work has already been noticed in its original text, L.Q.R. xxii. 244. The learned contributor of that review expressed the hope that an English translation would soon appear, and we now have one which may be accepted without discussion, as it is approved by the author, and has been seen and considered by Sir Courtenay Ilbert. From the Clerk of the House of Commons, too, we have a supplementary chapter bringing the procedure on Private Bills up to date, and a bird's-eye historical view of our parliamentary forms by way of preface. Sir Courtenay shrewdly asks where our two-party system might have been 'if the House of Commons had continued to occupy a circular building, like the Westminster Chapter House, or had established themselves, like Continental legislatures, in a building fashioned after the manner of a theatre.' The query would have pleased Bacon; it is quite in the manner of some of his remarks on public business. We are not sure whether another passage does or does not imply disapproval of the Defence Committee or any possible analogous novelties.

La démocratie individualiste. Par YVES GUYOT. Paris: V. Giard et E. Brière. 1907. 8vo. viii and 269 pp.—A handbook of individualist economics in the first line, but touching on constitutional law and the theory of politics; with some special reference to English publicists. Review will follow.

Du Régime des Capitulations en Turquie par rapport à la Bulgarie. Par ALBERT CALEB. Geneva: Philippe Dürr (undated). 12mo. 48 pp.—The author of this pamphlet is a Bulgarian by nationality who holds a chair as *Privat-Docent* at the University of Geneva. He endeavours to substantiate the claim of his country of origin to be treated as belonging to the family of Western nations, and therefore to be relieved from the exceptional *régime* of exterritorial justice imposed by the Capitulations on Turkey, of which nominally Bulgaria is still a vassal. 'In the opinion of eminent jurists,' he says, 'our legislation is one of the most liberal and progressive of the continent' (p. 47) and, as regards her administration Bulgaria is at least on the same level as Servia, Greece, and Roumania, where the capitulary *régime* has long since ceased to exist. M. Caleb recommends his countrymen to show themselves worthy of the removal of the 'humiliating legacy,' i.e. to make it obsolete by consistent good government and well-organized judicial institutions. All this, of course, is not really law, but politics.

Land Title Registration. By HENRY PEGRAM, of the New York Bar. 112 pp.—This is a paper presented at the thirty-first annual meeting of the New York Bar Association in January last. The author was a member of the recent New York State Commission to investigate the Torrens system of Land Title Registration. The paper (now reprinted from the report of the proceedings of the Bar Association) consists of a short account (necessarily of the most sketchy description) of every system of registration of title in use among nations of 'the Caucasian race'—i.e. throughout the British Empire, the United States, Austria-Hungary, Denmark, Germany, Norway, Sweden, and Switzerland. In conclusion, a list of thirteen points made in favour of conveyancing by registration of title, and another list of fourteen points against it, is given. The best point 'against' is that relating to the difficulty of getting the land on to the register for the first time.

New Regulations of the French Law of January 30, 1907, *affecting English Companies issuing or circulating their securities in France.* By PIERRE PELLERIN. London: Stevens & Sons, Lim. 1908. 12mo. 18 pp.—In this short pamphlet we find briefly and clearly summarized the salient points of interest to English companies and company promoters intending to issue securities in France. Certain formalities must be observed, and among them a very costly insertion in the 'Bulletin' of the 'Journal Officiel.' As the author puts it, 'the insertion has created considerable hardship upon foreign as compared with French companies.' But, he adds, reference can be made to Table A in order to curtail the insertion; but has this been tested in practice?

The Land Registry Fiasco. By J. S. RUBINSTEIN. Second Edition. London: Sweet & Maxwell, Lim. 1908. 8vo. 50 pp. (6*d.*)—There is room enough for serious criticism of the Land Transfer Act, 1897, and the working of registration under it; but the author of this pamphlet defeats his own object by the intemperate language of his attack. We do not say that all the champions of the system, from an ex-Lord Chancellor downwards, have been strictly temperate.

Journal of Comparative Legislation. Edited for the Society by SIR JOHN MACDONELL, C.B., and EDWARD MANSON. New Series, Vol. VIII, Part II (Dec., 1907). London: John Murray. 8vo. 165–475 pp. (5*s.* net.)—Among the more important articles in this number are: 'Customary and other Law in the East Africa Protectorate,' by Sir Lewis Tupper; 'Volenti non fit injuria in the Light of Recent Labour Legislation,' by Mr. Thomas Beven; and 'The Censorship of Stage Plays,' by Mr. W. F. Craies. There are also an appreciative note on Sir Edward Fry by Lord Justice Kennedy (with portrait), and Mr. Bryce's article on 'The Influence of National Character and Historical Environment on the development of the Common Law,' which has already appeared in this REVIEW.

Einführung in die Rechtswissenschaft. Eine juristische Enzyklopädie u. Methodologie. Von B. ERWIN GRUEBER. Berlin: O. Häring. 1908. 8vo. viii and 174 pp.—A new and enlarged edition of the learned author's introduction to the science of law reprinted from Birkmeyer's Encyclopaedia in 1901 (L. Q. R. xvii. 105).

La Substance des Obligations dans le droit international privé. Par D. JOSEPHUS JITTA. Two vols. La Haye: Belinfante Frères. 1906–1907. La. 8vo. Vol. I, xv and 468 pp. Vol. II, xx and 534 pp.

Law and Practice in Divorce and other Matrimonial Causes. By W. J. DIXON. Fourth Edition. London: Butterworth & Co. 1908. 8vo. lxiv, 439 and 74 (index) pp. (22*s.* 6*d.*)

A Selection of Leading Cases in the Common Law, with notes. By WALTER SHIRLEY SHIRLEY. Eighth Edition by RICHARD WATSON. London: Stevens & Sons, Lim. 1908. 8vo. lxviii and 710 pp. (16*s.*)

English Society in the Eleventh Century: Essays in English Mediaeval History. By PAUL VINOGRADOFF. Oxford: At the Clarendon Press. 1908. 8vo. xii and 599 pp. (16*s.* net.)—Review will follow.

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NOTES.

HUNT v. *Star Newspaper Co.* [1908] 2 K. B. 309, C. A., is another example of what we must call the confusion that tends to gather round libel cases. A returning officer at a county council election was charged in two newspaper articles with wilfully preventing the agents of the party to whom he was opposed from exercising their functions in watching for any cases of personation; it was alleged that his answer to a remonstrance was, 'I am not going to take the opinion of my political opponents.' The conduct attributed to him was described as 'assertion of political bias on the part of an officer at a polling station.' He brought a libel action against the company which owned and published both newspapers. One would think that the charge made in these articles was a direct charge of abusing official position, and that if the publication was proved or admitted the only possible defence was justification; for the character of the misconduct alleged, if it really took place, was not open to dispute. If *A* takes *B*'s goods out of *B*'s possession by force, against *B*'s will, without colour of right, and intending to convert the goods to his own use, and *C* thereupon says that *A* stole the goods, or is a thief, that is not comment, but a statement of the legal aspect of the fact; and 'assertion of political bias' surely does not go beyond a bare statement of what the plaintiff in this case had said—if he did say it.

The defendant company, however, pleaded, in a form which is now common, that the words complained of were true so far as they stated fact, and fair comment on matter of public interest so far as they were comment. Now the Court of Appeal decided quite lately in *Digby* v. *Financial News* [1907] 1 K. B. 502, 76 L. J. K. B. 321—a case which, strangely enough, does not seem to have been mentioned in *Hunt* v. *Star Newspaper Co.*—that this defence is not a justification and raises only the question of fair comment. Comment must rest on a foundation of fact to begin with; comment on fictitious allegations cannot be fair; but the two defences are of

a different kind, and the defence of fair comment has no application to distinct defamatory imputations in matter of fact: *Joynt* v. *Cycle Trade Publishing Co.* [1904] 2 K. B. 292, 73 L. J. K. B. 572. The jury ought to have been told, therefore, that, as the publication was not denied, and was obviously defamatory as a whole, and on the other hand the matter was clearly of public interest, it was for them to decide, first, whether the facts reported in the articles complained of were substantially correct—if not, verdict for the plaintiff; secondly, whether, the facts being truly reported, any further inference and comment appearing in the articles complained of, whether it was much or little, went beyond what might reasonably occur to a citizen anxious to vindicate the rule of official impartiality. What in fact they were told must be seen at large in the report; we cannot trust ourselves to extract any certain meaning from it; but it certainly might have led the jury to suppose that fair comment cannot include any inference of fact, and must not contain any personal censure, both of which suppositions would be contrary to law. The learned judge may have had *Campbell* v. *Spottiswoode*, 3 B. & S. 769, 32 L. J. Q. B. 185, in his mind. That case, now recognized as a leading authority by Fletcher Moulton L.J., notwithstanding the doubt recently thrown on its general doctrine by opinions expressed in the Court of Appeal (see L. Q. R. xxiii. 5, 97), decided only that the defence of fair comment will not cover imputations of dishonesty or bad motive made without any evidence. Accordingly the case before the Court was sent back for a new trial.

As to *Dakhyl* v. *Labouchere*, a decision of the House of Lords much referred to in *Hunt* v. *Star Newspaper Co.*, and now reported in a note thereto, we have great difficulty in seeing what point of law it decides, or what it contains more than elementary correction of a hasty summing up.

The decision of the Court of Appeal in *Nash* v. *Inman* [1908] 2 K. B. 1, takes one step farther in the process, which has now been going on for more than a generation, of strengthening the defences of infants against their creditors. By the old common law an infant's contract was generally voidable; that is, he could avoid or ratify it as he chose at full age; but in some cases he could bind himself even during infancy, and in particular for necessaries. Liability by ratification was abolished by the Infants' Relief Act, 1874, but of that we have no more to say just now. As to necessaries, it was far from settled, down to the middle of the nineteenth century or even later, whether necessaries meant such things as the infant really wanted or such as a person of his age and condition

in life might reasonably appear to want. The latter view was obviously the more convenient one to creditors, and there was some show of authority for it until the Courts remembered that the exception to an infant's general disability was not made for the creditor's benefit but for the infant's. In our own time it was settled that the question whether the defendant was adequately supplied at the time of the alleged contract was material; and the Sale of Goods Act, 1893, declared that goods in order to be necessaries must be suitable not only to the condition in life of the purchaser but 'to his actual requirements at the time of the sale and delivery.' Now the Court of Appeal has held that, whatever the common law may have been, the terms of this definition throw the burden of proof on the seller: 'it is for him to show that the defined circumstances enabling the infant to contract existed' (per Buckley L.J. [1908] 2 K. B. at p. 13). The judgments do not point out how the seller is to satisfy himself as to the amount and quality of like goods already in the buyer's possession, still less how he is to prove such facts in a court of justice except by the help of cross-examination. Practically the result would seem to be that prudent tradesmen will deal with infants only for cash, which, for anything we know, may be desirable.

An interesting and unsettled question is touched upon in *Nash* v. *Inman*, though it was not raised for decision. This is whether the Sale of Goods Act, in assimilating a minor's position to a lunatic's, and limiting his liability for necessary goods to a reasonable price, did or did not merely affirm the common law; there are cases outside the Sale of Goods Act—apprenticeship and the hiring of lodgings, for example—where the point might be material. Fletcher Moulton L.J. expressed a distinct opinion that the obligation to pay for necessaries is wholly implied by law, and the measure of damages in an action for the price of necessaries was always the value and not the agreed price. We do not know what authority definitely shows this to be 'very ancient law,' and we did not know that when minors ordered goods on credit they commonly were so prudent as to bargain about the price. Nevertheless there is much to be said on principle for this view; it was certainly that of Sir Mackenzie Chalmers when he drew the Sale of Goods Act, a codifying Act intended to innovate as little as possible; and it appears to be generally received without dispute in the United States. In Buckley L.J.'s judgment there is language that seems to tend the other way, but he does not deal with the point explicitly. Cozens-Hardy M.R. confines himself to the construction of the Sale of Goods Act on the point actually before

inconvenience and expense must be so serious as, *per se*, to inflict an injustice on the defendant and prevent him from obtaining practical justice at all.

In *Re Norton's Settlement*, the defendant was a practising barrister in India, where all the witnesses resided, and the plaintiff, his wife, had refused without reasonable excuse to live with her husband, preferring to live in England. The Court of Appeal, in exercise of its inherent jurisdiction to stay proceedings which are an abuse of the process of the Courts, stayed the plaintiff's action, holding that the lady ought to have been residing in India with her husband, from which fact, and from other circumstances in the case, it appeared to the Court that the English action had been commenced, not to ensure justice for the plaintiff, but to inflict as much hardship as possible upon the defendant.

Markham v. *Paget* [1908] 1 Ch. 697, 77 L. J. Ch. 451, contains an excellent review by Swinfen Eady J. of the authorities on the subject of implied contracts for the quiet enjoyment of property let or leased.

Not only will the use of the word 'demise' in a lease under seal raise the implication, *Hart* v. *Windsor* (1844) 12 M. & W. 68, 67 R. R. 266, but the use of the word 'let' in an agreement in writing likewise has the same effect, *Mostyn* v. *West Mostyn Coal and Iron Company* (1876) 1 C. P. D. 145. But this is not all, for the authorities go still further and establish the reasonable and necessary proposition that the implication arises from the mere relation of landlord and tenant, and the mere fact of letting, without the user of any particular operative word or words whatever. *Hall* v. *City of London Brewery* (1862) 2 B. & S. 737, per Cockburn C.J., and *Budd-Scott* v. *Daniell* [1902] 2 K. B. 331, per Lord Alverstone C.J.

Passing from the implied covenant for quiet enjoyment, we next have to consider the question of fitness of dwelling-houses for habitation. The case of *Cameron* v. *Young* [1908] A. C. 176, once more reminds us how unsatisfactory is the law on this subject. In that case it was shown that there is by the law of Scotland an implied obligation on a landlord to let and maintain an urban dwelling-house in a fit state for habitation, but the House of Lords held, in accordance with precedent, that this gave no claim to the tenant's wife and family for illness caused to them through the unsanitary condition of the place, upon the ground that the latter were not contracting parties with the landlord; and see *Cavalier* v. *Pope* [1906] A. C. 428.

In England there is no obligation (except by special agreement) for a landlord to pay any attention whatever to the condition of

a house which he lets to a family, either at the time of the letting or at any later period during the tenancy, and neither tenant, tenant's family, nor tenant's guests have any remedy for injury sustained by them as a result of bad drains, or even by the collapse of the structure itself. A would-be tenant may of course have the property inspected and tested before agreeing to take them, but the majority of tenants cannot afford to do this, and yet, strange to say, the landlord will be under no liability even though he knew at the time the unsuspecting tenants walked into the premises that they were unfit for human habitation (*Hart* v. *Windsor*, 12 M. & W. 68, 67 R. R. 266).

The wide power which a limited Company possesses over its assets, though the assets may be subject to floating debentures, is plainly shown in *Cox Moore* v. *Peruvian Corporation* [1908] 1 Ch. 604, 77 L. J. Ch. 387. In this case Warrington J. allowed the Company to mortgage specific assets on a very extensive scale and to give the mortgagees priority over the debenture holders. The new charge was for so large an amount and was secured upon so much of the Company's assets as to make it desirable for the debenture holders to oppose the transaction. The reasons for his Lordship's decision were, first, that a floating security only 'attaches to the subject charged in the varying conditions in which it happens to be from time to time' (per Lord Macnaghten in *Government Stock and other Securities Investment Co.* v. *Manilla Rail. Co.* [1897] A. C. 81, 86), and that a company retains normal powers to deal with these assets in the way of its business until the company ceases to be a going concern or the debenture holders intervene and take possession of them; second, that no evidence had been tendered by the debenture holders that the money was not wanted for the ordinary business of the corporation; and third, that on the face of the debentures there were the express words 'not interfering with the dealing with and distribution of the property rights and effects or the division of its profits by the Company among its members.' These words enabled the Company to deal with its property in spite of the debentures, and, as Warrington J. pointed out, there was nothing in them to limit the Company's normal right to mortgage its specific assets in the usual manner. One of the conditions on the debentures made the consent of the debenture holders necessary to the issue of other debentures to rank *pari passu* with theirs, but the contemplated fresh transaction was, of course, not an issue of debentures at all.

Reduced to its elements, the case was a very simple one. The Peruvian Corporation—which was formed with an objects-clause of

the widest description—to buy land, make railways, build ships, construct canals, docks, &c.—*hoc genus omne*—had under the powers in its memorandum duly issued 'Mortgage Debentures' for £3,700,000 as part of an authorized issue of £6,000,000, and these debentures were secured by a floating charge. Incidentally it may be remarked that the expression 'Mortgage Debentures' is in such a case an improper one both from a legal and a business point of view. The committee of the London Stock Exchange object to any debentures being described as Mortgage Debentures unless they are secured by a legal mortgage. Leaving this point, however, the matter in controversy was whether, these debentures for £3,700,000 being still outstanding, the Corporation could create a specific mortgage on its property in priority to the debenture holders' floating charge. In the absence of anything to negative such a right it is always competent to a company to create a specific mortgage, but in the Peruvian Corporation case the matter was *a fortiori*, one of the endorsed conditions expressly providing that the floating charge was not to interfere with the dealing with and distribution of the property rights and effects until default had been made in payment of some principal money or interest secured by the debenture, and steps had been taken to enforce the charge, which events had not happened. The sense of the matter as a business arrangement is that the debenture holders having identified themselves with the interests of the company by taking a charge on the whole undertaking and assets, give a licence to the company to use the property charged in carrying out the objects of the company for the joint benefit of the company and the debenture holders, as if no charge existed.

The dissentient debenture holders made a point of a meeting of debenture holders having power under the conditions of the debenture to sanction new debenture holders ranking *pari passu* with them, but this sanction had nothing to do with the independent power of the company to create a specific mortgage.

Under our present system of conveyancing, with its retrospective investigation of title—which for better or worse still holds the field—conditions of sale are indispensable to protect the weak points of a title. The elementary moral of *Hopkinson* v. *Chamberlain* ([1908] 1 Ch. 853) is that, if a purchaser in buying property has committed himself to certain admissions, he is bound by his bargain. The property in question was copyhold—purchased for £495—and the condition in dispute ran thus: 'No evidence shall be required of the payment or discharge of any legacy or sum of money charged on the property which became payable twelve years or upwards prior to the day of sale, but a statutory declaration will

be furnished, at the expense of a purchaser who requires it, that no payment or claim has been made in respect thereof during such twelve years.' It appeared that some thirty years before the sale there had been a conditional surrender of the property by way of mortgage to secure a sum of £150; but the mortgagee had never been admitted, and no payment or acknowledgment in respect of either principal or interest had been made for more than twelve years prior to the date of the sale. There, however, the equitable charge was on the Court Rolls; the purchaser had notice of it, and the charge being—on the face of it—unsatisfied, it constituted a serious cloud on the purchaser's title, in view of which he refused to complete. But these are considerations with which a purchaser must reckon beforehand when he is buying subject to conditions, and, it may be added, as a matter of public policy: in the interests of our conveyancing system and its simplification, the Court ought in such a case to hold a purchaser strictly to his contract. No notice seems to have been taken either by counsel or by the Court of the fact that the equitable mortgage did not appear on the vendor's abstract of title. The purchaser only discovered it when he came to search the Court Rolls. This was clearly wrong. Satisfied or not, the charge ought to have been disclosed.

Slade v. *Chaine* [1908] 1 Ch. 522, 77 L. J. Ch. 377, confirms the rule that when a trustee of a settlement, created by deed, receives a high rate of interest from an unauthorized and risky investment, and duly returns the capital into the estate and pays the interest to the tenant for life, the remainder-man cannot call upon either the trustee or the tenant for life to contribute a portion of it for the benefit of the capital: see *Stroud* v. *Gwyer* (1860) 28 Beav. 130. The mere risk which the capital ran gives rise to no such claim. If, however, a trustee so invests money, which is lost, and is unable when the time comes to make good the whole of the loss to the estate, no doubt the remainder-man can restrict the tenant for life to a reasonable rate of interest, whatever may have been the interest actually earned, and claim to have the surplus interest treated as capital, in consideration of the risk run by the latter.

'Profits' or 'accumulations' made by an unauthorized use of the trust funds stand on a different footing, and the remainder-man is entitled to have these treated as part of the capital, and, as such, made subject to the trusts of the settlement.

When the settlement consists of a residuary gift of personalty under a will a different consideration arises, for the rule in *Howe* v. *Earl of Dartmouth* (1802) 7 Ves. 137, 6 R. R. 96, applies as regards those investments which are in existence at the death of the settlor.

Leschallas v. *Woolf* [1908] 1 Ch. 641, 77 L. J. Ch. 345, is a useful decision upon the law relating to the surrender of tenant's and trade fixtures put into demised premises by a subtenant. If there is a covenant in a head lease to yield up 'all fixtures' when the term comes to an end, tenant's and trade fixtures must be yielded up, although the application of the covenant may be easily restricted to landlord's fixtures by the use of words showing such an intention: *Bishop* v. *Elliott* (1855) 24 L. J. Ex. 229, per Coleridge J., and *Dumergue* v. *Rumsey* (1863) 33 L. J. Ex. 90, per Williams J. Even if a person taking a sublease had no actual notice of the covenant, as to yielding up the fixtures, he would be deemed to have had notice thereof under the principle of *Patman* v. *Harland* (1881) 17 Ch. D. 353.

In *Leschallas* v. *Woolf* not only had the original lessee surrendered his lease, but the subtenant too had thereupon surrendered his tenancy and taken a fresh tenancy from the lessor, which latter circumstance Parker J. held to be conclusive of the fact that the subtenant's right to his tenant's and trade fixtures was gone, as all such fixtures must be removed either during the tenancy, *Poole's* case (1703) 1 Salk. 368, or at least whilst the relation of landlord and tenant is being prolonged by a continuance of occupation without a definite break in the relation (*Mackintosh* v. *Trotter* (1838) 3 M. & W. 184, 49 R. R. 565, per Parke B.).

The owner of a building let out in flats or offices is answerable without express agreement for a common staircase remaining in his possession being in safe repair, as the Court of Appeal decided fifteen years ago in *Miller* v. *Hancock* [1893] 2 Q. B. 177; but he is not in like manner answerable for its being lighted, at all events if in fact every tenant is accustomed to light his own portion of landing: so the same authority has held in *Huggett* v. *Miers* [1908] 2 K. B. 273. As a matter of common sense the distinction appears reasonable. It would be impossible for every tenant to repair his own portion of the staircase, but it is quite practicable for every tenant to light the landing opposite his own door, and it may well be more convenient than any other arrangement.

The judgment of Parker J. in *Lord Fitzhardinge* v. *Purcell* [1908] 2 Ch. 139 will be found excellent reading by all lawyers who are at all curious in the antiquities of foreshore and fishery rights. Note that if a plaintiff suing for trespass can make out his possession of the *locus in quo* only by showing that it is held under the same title as adjacent land of which his actual possession is proved or

admitted, and is free from any adverse possession in fact, the defendant may traverse his title thus made matter of evidence, and is not bound to show a better right in himself. The rule against setting up a 'jus tertii' applies only for the benefit of a plaintiff who relies on actual possession, and not where possession has to be inferred from title.

A Puzzle in the Law of Allegiance.

We owe to the kindness of a correspondent the following curious problem in international law, which, as will be seen, arises out of actual facts.

About three years ago a man and woman who were husband and wife travelled from the Far East on a French mail steamer. Their national position is extremely doubtful; the facts are stated below.

Arrived in Turkish territorial waters (Port Said) the woman gave birth to a male child on board the steamer.

The parents, having landed at Marseilles from the same French steamer, carried the child to Paris, where, after baptism according to Roman Catholic rites, its birth was registered. The Registrar of Births, having satisfied himself that the parents had no nationality, registered this child as a French citizen.

If the child should live to be eighteen years of age he may be called upon to serve in the French army. To avoid this service, or for any other reason, could he declare himself to be a Turkish subject? Or,

Seeing that he is the offspring of parents of no nationality and therefore owes no natural allegiance to any nation, could he freely declare his nationality to be any one of his choice?

Suppose, again, that the child had been born a day sooner, therefore, not in Turkish territorial waters, but in the Suez Canal; how would that circumstance have affected his nationality?

Now as to the precise facts:—

The parents of the child in question were both born in the Philippine Islands.

Up to the year 1898 they were Spanish subjects.

After the American occupation of the Islands, persons born therein were not allowed to remain Spanish subjects, nor did they become American citizens.

It is distinctly declared that the Philippine Islands are not an American Territory, nor an American State: the political status of the Filipinos still remains to be determined by Congress as provided by the Treaty of Cession, and meanwhile they are

officially described as being 'under the protection'—not as subjects—'of the United States of America.'

There is not and there never was a nationality known as Philippine. For greater certainty it may be added that there is not any Egyptian nationality, though this does not materially affect the problem.

Solutions from our learned readers will be welcome.

The volume of transactions of the American Bar Association for 1907 contains, among other matter of various interest, a full report from the Committee on legal education. It is now very generally held in America that a legal practitioner ought to be as thoroughly trained for his work as a medical one, and in a majority of the States a definite course of study (not merely examination with optional facilities for study) is prescribed as a condition of being admitted to practice. The Province of Ontario, we may add, has long been in line with the most exigent jurisdictions in the United States on this point. It should be noted that attendance in a law office—which is on the whole much more like a solicitor's office than counsel's chambers—does not seem to be found very instructive; in fact the modern conditions which hand over all the clerical work to shorthand writers and typists are said to have made it useless. In the President's address (Judge Parker of New York, by the way, seemed at one time a possible President not of the Bar Association but of the United States) it is recorded that a special convention has taken up the problem of a uniform divorce law, which the Association had dropped for the time being as all but hopeless.

There is now a regular series of reports of cases determined in the Supreme Court of Hong Kong, of which two volumes (1905-1907) have been published. They appear to have an official character, but in the copy we have seen there is no title-page or imprint, nor is the reporter named.

ERRATUM.

Vol. xxiv, p. 145, note 2 (April 1908), for 'p. 3' read 'p. 135'.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE EASEMENT OF LIGHT AND AIR AND ITS LIMITATIONS UNDER ENGLISH LAW.

II.

AS *Colls's* case was eventually taken to the House of Lords, and has become the leading authority upon the subject, it deserves more detailed examination.

It was an action for obstruction of the ancient lights of a large corner block of premises in the City of London: and the material findings of fact by Joyce J. were as follows[1]:—

'Various expert witnesses were examined, and as the result of their evidence I am of opinion that the proposed new building of the defendant would not affect the selling or letting value of the plaintiff's premises. . . . Apart from any question with respect to the back part of the office on the ground floor of the plaintiff's premises and to the extraordinary light required, . . . the plaintiff's premises would still, in my opinion, after the erection of the defendant's building, be well and sufficiently lighted for all ordinary purposes of occupancy as a place of business. For all ordinary days they have amply sufficient light; at present they have abundance of light, and are, in my opinion, unusually well lighted. *If as it is contended on behalf of the plaintiffs, they are entitled to the full amount of light now enjoyed, without appreciable diminution*, the plaintiff would have a good cause of action upon the erection of the defendant's building, though it might perhaps be doubted whether the diminution that would be caused by the defendant's building, if and when erected, is sufficiently serious to entitle the plaintiffs to an injunction.'

The learned judge then, in deference to the decision of Wright J. in *Warren* v. *Brown*, decided in favour of the defendants.

Two points seem noteworthy, at the outset, upon this finding: (1) That, if the plaintiff's claim was as stated, it was clearly excessive. It amounted to a claim to prohibit any sensible invasion of a right to the whole of the light which reached the windows. This (as has been already pointed out) may be logical, but is not the law of England. (2) There was no necessity for the learned judge to rely upon *Warren* v. *Brown* at all; for his finding really amounts to this: that, though there would be some sensible abstraction of light, it would not be enough to make the premises less fit for the purposes of business or occupation, and therefore not

[1] [1902] 1 Ch. at pp. 304, 305.

a nuisance. When the case came before the Court of Appeal[1] it must be confessed that the judgment of the Court was couched in rather perplexing language. They begin by reiterating the statement of the law as laid down by them in *Warren* v. *Brown*, viz.:— 'If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief.' Now this is evidently meant to be a statement of the law as laid down in *Back* v. *Stacey* and *Parker* v. *Smith*, as the words used in those cases are quoted as an authority for the proposition; but it may be doubted if it is, especially if taken in connexion with certain words that follow (at p. 311):—

'But there may be real damage to the owner or occupier of a building used for particular purposes, or reasonably adapted for particular purposes, although there would be no real damage if the building were not used or reasonably adapted for such purposes.'

These words are not very clear, but they might give rise to an interpretation dangerously near to the plaintiff's contention as stated by Joyce J.

Upon whatever ground, the Court of Appeal, in substance, came to the conclusion that, upon the findings of Joyce J., judgment ought to be given for the plaintiffs. The defendants then appealed to the House of Lords, who reversed the decision of the Court of Appeal and restored that of Joyce J.[2] This decision itself gives rise to no particular difficulty, as it proceeded ostensibly upon the ground that upon the findings of Joyce J. the defendant's acts did not amount to a nuisance. It is when one comes to consider the conflicting reasons given by the Law Lords for their opinions that the matter seems to be involved in confusion. This is evident from the difference of judicial opinion that has since arisen as to what really is the rule of law to be derived from the case.

To deal with the judgments seriatim: the Earl of Halsbury L. C. states the question at issue thus[3]:—

'After an enjoyment of light for twenty years or, if the question arose before the Act, for such a period as would justify the presumption of a lost grant, would the owner of the tenement in respect of which such enjoyment had been possessed be entitled to all the light without any diminution whatsoever at the end of such a period[4].'

[1] [1902] 1 Ch. 302. [2] [1904] A. C. 179. [3] At p. 182.

[4] The affirmative of this proposition, according to Joyce J., had been the contention of the plaintiffs in the case, but it never was adopted by the Court of Appeal, though upon the face of the proceedings it might seem as though it had been; because they employed a form of injunction (borrowed from *Yates* v. *Jack*, L. R. 1 Ch. 298), which is more extensive than the relief which they really intended to give.

His Lordship proceeds to negative this proposition, and states the true test thus[1]:—

'The test of the right is, I think, whether the obstruction complained of is a nuisance, and, as it appears to me, the value of the test makes (*sic*) the amount of right acquired depend upon the surroundings and circumstances of light coming from other sources, as well as the question of the proximity of the premises complained of. What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell, and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell, and noise, may give a cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action. . . . Of course, my Lords, it must be taken that the foundation of this judgment rests upon the finding of fact by Joyce J., that the buildings of the defendant had not so materially interfered with the light previously enjoyed by the plaintiff as to amount to a nuisance.'

No one would quarrel with this statement of the law. Indeed, may it be said with respect, one could not wish for a more apt summary of it; apart from the somewhat academic question of the difference in extent between the *right* and the *remedy*, before alluded to. But the Lord Chancellor then goes on to say[2] that he thinks that *Warren* v. *Brown* was rightly decided by Wright J., and ought to have been affirmed by the Court of Appeal. This is startling, because, if Wright J. meant to decide what the Court of Appeal (*after consultation with him*) say that he meant to decide, it would seem that not only the law as laid down by Wright J., but his application of it to the facts of the case is in flat conflict with the law as expounded by the Lord Chancellor. One can only reconcile the two statements by assuming that the Lord Chancellor did not agree with the Court of Appeal in their interpretation of Wright J.'s judgment.

Lord Macnaghten begins his judgment by saying that the true test is that laid down in *Back* v. *Stacey*, *Parker* v. *Smith*, and *Wells* v. *Ody*, both for the exercise of common law and equity jurisdiction. He then proceeds[3]:—

'Although the question thus stated appears tolerably simple, it cannot be disputed that the reported cases on questions of light in recent times are not altogether consistent. *There seem to be two divergent views, neither of which, I think, is absolutely accurate.* The extreme view on one side is that the right which is acquired by so-called statutory prescription is a right to the continuance of the

[1] At p. 185. [2] At p. 185. [3] At p. 189.

whole or substantially the whole quantity of light which has come to the windows during a period of twenty years. . . . The extreme view on the other side is that the right is limited to a sufficient quantity of light for ordinary purposes.'

He then explains the error of the former view as probably the result of a mistaken view of the effect of the Prescription Act. And as regards the latter view (which is obviously taken from the judgment of Wright J. in *Warren* v. *Brown*) he says this[1]:—

'Perhaps I ought to add a word about *Warren* v. *Brown* which is referred to in both the judgments below. I cannot say that that case is quite satisfactory to my mind either as dealt with in the Court of first instance or in the Court of Appeal. In the Court of first instance the learned Judge who tried the case found a special verdict which is not very easy to understand. The room in which the light has been materially diminished "in its present state is," he says, "better lighted than the ground floor rooms in many of the principal streets."'

'I do not see what bearing that fact had on the question at issue. Then, instead of keeping in view the direction which judges over and over again have said ought to be kept in view, the learned judge embarks on an inquiry to determine which of the two extreme views is correct. I doubt whether either the one or the other can be accepted as a safe guide without qualification. The Court of Appeal in their turn, instead of dealing with the facts before them, combat a particular view which, rightly or wrongly, they attribute to Wright J., *I do not think* Warren *v.* Brown *helps us much*.'

As regards the merits of the case under review he said[2]:—

'It cannot be disputed that some diminution of light is caused by the defendant's buildings; but, such as it is, I think it is exactly what Best C. J. described as a partial inconvenience rather than serious injury.'

And he agreed that the judgment of the Court of Appeal should be reversed.

Lord Davey's judgment is more difficult to follow. The greater part of it is taken up with combating the view that the dominant owner was entitled to substantially the whole of the light which had had access to his windows. He then proceeds to attack a supposed suggestion which, so far as can be seen, had never been made, viz. that the dominant owner could, by applying the light which passed through his windows to some extraordinary purpose (unknown apparently to the owner of the servient tenement), increase the burden upon the servient tenement[3]. And he concludes as follows[4]:—

[1] At p. 194. [2] At p. 194.
[3] See *Ambler* v. *Gordon* [1904] 1 K. B. 417, and p. 258 below.
[4] At p. 204.

'According to both principle and authority I am of opinion that the owner and occupier of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind, and that the question for what purpose he has thought fit to use that light, or the mode in which he finds it convenient to arrange the internal structure of his tenement, does not affect the question. The actual user will neither increase nor diminish the light.'

Now 'ordinary purposes of inhabitancy or business' are words capable of more than one interpretation, but it would seem that the noble lord meant to adopt substantially the standard of Wright J. in *Warren* v. *Brown*, viz. that of 'the ordinary run of houses,' because he goes on to suggest that the oft discredited standard of 45 degrees of light may properly be used as prima facie evidence that an obstruction does not amount to a nuisance.

Lord Robertson simply concurred with Lord Davey's judgment.

The judgment of Lord Lindley also contains passages which it is not easy to reconcile. He begins thus[1]: 'My Lords, Joyce J. who tried this case . . . considered that although the buildings would sensibly diminish the plaintiff's light, the diminution would not materially affect his comfort or convenience.'

This was really sufficient to justify the appeal—without more—but the noble lord goes on to explain why he thinks so. He first deals with the Prescription Act and the theory, which was at one time in vogue, that, under that Act, the dominant owner was entitled to *all* the light that he had enjoyed without sensible diminution. That theory he declares to have been put an end to by *Kelk* v. *Pearson* and the cases following it. He then proceeds as follows[2]:—

'The doctrine laid down in *Back* v. *Stacey*, as I understand it, is the same as that laid down, although in somewhat different language, by the Court of Appeal in *Kelk* v. *Pearson* and *City of London Brewery Company* v. *Tennant*, and must, I think, be taken as finally established and as good sound law. . . . That doctrine, as stated in *City of London Brewery Company* v. *Tennant*, is that, generally speaking, an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling house, if it is a dwelling house, or for the beneficial use and occupation of the house, if it is a warehouse, shop, or other place of business. The expressions "the ordinary notions of mankind," "comfortable use and enjoyment," and "beneficial use and occupation" introduce elements of uncertainty, but similar uncertainty has always existed, and exists

[1] At p. 205. [2] At p. 208.

still, in all cases of nuisances, and in this country an obstruction of light has commonly been regarded as a nuisance, although the right to light has been regarded as a peculiar kind of easement. . . . The decision in *Kelk* v. *Pearson* has a far-reaching effect. If there is no absolute right to all the light which comes to a given window, no action will be for an obstruction to that light, unless the obstruction amounts to a nuisance. If there is no right of action, *a fortiori*, there is no right to an injunction.'

A little later follow some words which seem to indicate that the writer after all is in harmony with the views of Lord Macnaghten and that he thinks that the decision of Wright J. in *Warren* v. *Brown* was wrong[1]:—

'*In applying the rule laid down in* Kelk *v.* Pearson *it is impossible to avoid considering how much light is left and where it comes from. But the question to be decided is not how much light is left, but whether the plaintiff has been deprived of so much as to constitute an actionable nuisance. If he has it is no defence to say that he has as much light left as most other people, see* Dent *v.* Auction Mart Company[2]. Too much weight may have been given by Wright J. to the amount of light left in *Warren* v. *Brown*, and this may explain the reversal of his decision by the Court of Appeal.'

Notwithstanding these words the noble lord proceeds to give a very qualified and guarded approbation of the rule of 45 degrees of light as being sufficient, as a general rule; not as a rule of law, but as one of practical application.

It is not surprising that the judgments which have just been dealt with have not conveyed to the legal mind a very exact idea of what *Colls's* case has really decided.

In *Higgins* v. *Betts*[3] Farwell J. thus states the effect of the case[4]:—

'The dominant owner was never entitled either by prescription or under the act to all the light that came through his windows. It was not enough to show that some light had been taken, but the question always was whether so much had been taken as to cause a nuisance. But for many years the tendency of the Courts had been to measure the nuisance by the amount taken from the light required, and not to consider whether the amount left was sufficient for the reasonable comfort of the house according to ordinary requirements. If a man had a house with unusually excellent lights it was treated as a nuisance if he was deprived of a substantial part of it, even though a fair amount for ordinary purposes was left. *It is in this respect that* Colls's *case has, to my mind, readjusted the law.* It is still, as it always has been, a question of nuisance or no nuisance, but the test of nuisance is not how much light has been taken, and is that enough materially to lessen the enjoyment and use of the

[1] At p. 210.
[2] L. R. 2 Eq. 250, 251.
[3] [1905] 2 Ch. 210.
[4] At p. 215.

house that its owner previously had? but how much is left, and is that enough for the comfortable use and enjoyment of the house according to the ordinary requirements of mankind?'

This puts the point in a nutshell, but it will be observed that the learned judge's conclusion is diametrically opposed to the terms of the judgment of Lords Macnaghten and Lindley and to the spirit, if not to the terms, of the judgment of Lord Halsbury.

Another case in which the same question arose was *Kine* v. *Jolly*[1]. That was an action for obstruction of light to a suburban house. Kekewich J., who was the judge of first instance, found the facts as follows[2]:—

'The great cause of complaint has been of the obstruction of light to what has been called the morning room. *It was an exceptionally well-lighted room, and even now is well-lighted; so that if the test were whether there is sufficient light left to enable the room to be used for the purposes for which it was designed there would be no further question.* As I understand the judgment of the House of Lords, that is not the test, though it is a matter for consideration.'

He then considered all the circumstances, and came to the conclusion that the obstruction of light to the morning room was a nuisance within the meaning of the authorities; and he assessed the damage at £300 or £400.

The defendants appealed, and the Court of Appeal in substance affirmed the decision of Kekewich J.; and Cozens-Hardy L. J. stated the effect of *Colls's* case as follows[3]:—

'The decision in *Colls's* case therefore does not seem to me to amount to more than this—that an obstruction which neither lessens the letting or selling value of the house, nor materially affects the comfort or convenience of the occupier, does not in law justify an action even though a large proportion of light previously enjoyed has been lost.'

He further says this[4]:—

'*It has been strenuously urged on behalf of the appellant that all that we have to consider is the amount of light which has been left. I cannot accept that view of the law.* It seems to me that the law as approved by the House of Lords, particularly by Lord Macnaghten, cannot be better stated than it was by Parke B. in *Wells* v. *Ody*: "The question, therefore, which I shall leave to you is, whether the effect of the defendant's building is to diminish the light and air so as sensibly to affect the occupation of the plaintiff's premises, and make them less fit for occupation." *Is it any answer to say that the room is still a well-lighted room? I think not,* if the building makes the room less fit for occupation, and I do not think that we can

[1] Decided in December, 1904, but only reported in [1905] 1 Ch. 480, see note there.
[2] At p. 483. [3] At p. 502. [4] At p. 503.

bring in the phrase "according to the ordinary notions of mankind" to cut down the effect which would otherwise result from a building of this nature.'

Cozens-Hardy L. J. and Farwell J. therefore came to exactly opposite conclusions as to what *Colls's* case had really decided.

The case of *Kine* v. *Jolly* was taken to the House of Lords[1], and in that House the Law Lords were equally divided, the Lord Chancellor and Lord James of Hereford holding that the appeal should be dismissed, the latter quoting with approval the judgment of Cozens-Hardy L. J., and Lords Robertson and Atkinson holding that the decision of the Courts below conflicted with *Colls's* case, and should be reversed. Under these circumstances the decision of the Court of Appeal stood affirmed.

This closes the chapter of authority, and it can hardly be said that it is either edifying or conclusive. The embarrassed lawyer is left to form his own opinion as to the results of the discussion.

It may be worth while to suggest, in the first place, what has been *decided* by *Colls's* case and what has not. The following points have undoubtedly been *decided*:—

(1) The right of the dominant owner, *which he can protect by an action*, is not a right to, substantially, the whole of the light which has had access to his windows.

(2) That an obstruction to light to be actionable must amount to a nuisance.

(3) That this means (to use the words of Mellish L. J. in *Kelk* v. *Pearson*) that the house of the dominant owner is rendered substantially less fit for the purpose of occupation than it was before.

But it is submitted that the following point has *not* been *decided*. At the most the judgments thereon were *obiter dicta*.

(4) That the dominant owner cannot complain if, notwithstanding the fact that the house is rendered substantially less fit for the purposes of occupation than it was before, it still has left as much light as the average run of houses.

Further, it may be suggested, without presumption, having regard to the great conflict of judicial opinion, that the last proposition is really contrary to both principle and authority[2].

It is wrong on principle because (1) the *right* of the dominant owner, being a conventional right, must amount to the whole of that which has been granted or acquired by prescription, even if

[1] [1907] A. C. 1.

[2] There is a good *reductio ad absurdum* of it by Romer L. J. in the course of the argument in *Warren* v. *Brown* ([1902] 1 K. B. at p. 19), 'Suppose a man has five ancient windows and the light to one of them is entirely obstructed, can he be told that he has no right of action because the other four are sufficient for all ordinary purposes of inhabitancy or business?'

the law cannot be invoked to protect the whole. There is no other standard of right by which an interference can be measured. (2) To say otherwise is to ignore the distinction between conventional rights and common law rights of property. (3) Even if the right be regarded as a common law right, with the limitations involved therein, to adopt the standard suggested would be contrary to the well-settled law as to actions for nuisance.

Upon this latter point it is worth while to recall the direction of Mellor J. to the jury in *St. Helen's Smelting Company* v. *Tipping*[1], which was unanimously approved by the judges (Martin and Pigott BB., Willes, Blackburn, Keating, and Shee JJ.) and by the Law Lords (Lords Westbury, Cranworth, and Wensleydale). It would be impossible to have higher authority:—

'The learned judge told the jury that an actionable injury was one producing sensible discomfort; that every man, unless enjoying rights obtained by prescription or agreement, was bound to use his own property in such a manner as not to injure the property of his neighbours: that there was no prescriptive right in this case—that the law did not regard trifling inconveniences: that everything must be looked at from a reasonable point of view: and therefore in an action for nuisance to property, arising from noxious vapours, *the injury to be actionable must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it.* That when the jurors came to consider the facts, all the circumstances, including those of time and locality, ought to be taken into consideration; and that with respect to the latter it was clear that in counties where great works had been erected and carried on persons must not stand on their extreme rights and bring actions in respect of every matter of annoyance, for, if so, the business of the whole country would be seriously interfered with.'

There is no suggestion here of any standard of 'ordinary occupancy' or the like. The standard is obviously that of the previous enjoyment.

There is no distinction in principle between an action for nuisance to property by interference with light and one for interference with the purity of air or water. In each case the standard by which the *interference* has to be measured is of the most elastic kind, varying with every local condition and circumstance—but if, measured by that standard, the jury find that it does sensibly diminish the comfort, enjoyment, or value of the property affected, the dominant owner is entitled to a verdict[2], however much may be left to him after the interference has been deducted.

[1] (1865) 11 H. L. C. 642.

[2] When once an action for obstruction of light is looked upon as *pari passu* with an action for a nuisance from smoke or pollution—the impossibility of a fixed standard, which could even be approximately measured by 45 degrees of light, becomes apparent. Imagine a legal percentage of pollution of air or water.

It is submitted also that the proposition is contrary to authority. There is no trace of such an idea in *Back* v. *Stacey*, *Parker* v. *Smith* or *Wells* v. *Ody*. On the contrary, it is clear that the standard of comparison in those cases was the amount of light actually enjoyed by the dominant tenement before it was invaded. In *Kelk* v. *Pearson* Mellish L. J. expressly negatives the proposition, and it is only to the expressions used by his colleague James L. J., in that and subsequent cases, that those who support the proposition can appeal. I have already dealt with the question of what James L. J. really meant by the words which he used in those cases, but there is one further point which is worthy of notice. James L. J., though at times capable of producing a sparkling legal epigram, was also not infrequently very clumsy in expression; and it is not by any means clear that the difficulties which have arisen from his language in *Kelk* v. *Pearson*, &c., are not merely the result of inaccurate phraseology. This will best appear by comparing two legal statements in parallel columns:—

James L. J. in *City of London Brewery Co.* v. *Tennant* at p. 216.

'He (that is the dominant owner) is entitled to sufficient light *according to the ordinary notions of mankind* for the comfortable use and enjoyment of that house as a dwelling house if it were a dwelling house, or for the beneficial use and occupation of the house, if it were a warehouse, a shop, or other place of business.'

Vaughan Williams L. J. in *Kine* v. *Jolly* at p. 492.

'The result of all these cases is that the *interference* with the access of light through the ancient windows of the plaintiff must be of such a character as sensibly to interfere with the comfort and convenience or usefulness of the building, according to its character as a residence or a place of business, or warehouse, or whatever else it may be, *according to the ordinary notion of mankind*—the citizens of this country.'

Now I believe that what James L. J. *meant* to say is what Vaughan Williams L. J. *did* say, and with that no one would quarrel. The extent of the *interference*—whether it amounts to an actionable nuisance, or whether it merely amounts to an inconvenience—has to be measured, not according to the ideas of a very sensitive or fastidious person, but by the ideas of the common run of mankind (i. e. the jury). This is a wholly different thing from saying that the *right* of the dominant owner is to be measured by that standard. Yet James L. J. in *City of London Brewery Company* v. *Tennant*[1] and some of the learned judges who quote him treat these two propositions as if they were convertible.

Is it possible that much of this controversy is really a question of words, and that nearly all parties would agree to some such propositions as the following:—

[1] L. R. 9 Ch. at p. 216.

In cases of nuisance the law does not regard trifling inconveniences. A nuisance to be actionable must be one that produces sensible diminution of the comfort, convenience, or salubrity of life or property from that which previously existed; regard being always had to time and place and the surrounding circumstances generally. As an occupier of a house in Widnes or St. Helens cannot demand the same purity of atmosphere as a dweller in Buxton, so a dweller in Drury or Fetter Lane cannot expect the same amount of light as a dweller in Grosvenor Square. It is all relative to the conditions of the particular case; and must be judged, not by reference to the standard of a fastidious or sensitive person, but by reference to the views of the ordinary run of mankind. This is applicable to actions for obstruction of light as well as to other actions for a nuisance.

Would not that be an unimpeachable charge to a jury even if the presiding judge refused to leave to the jury, as *irrelevant*, the further question 'whether the amount of light remaining after the obstruction is sufficient for all ordinary purposes of business or occupation?'

One word in conclusion. Lords Robertson, Davey, and Lindley expressly leave open the question whether a dominant owner can be heard to prove a special prescription for an extraordinary amount of light. In the judgment of Lord Lindley, before it was revised, he expressed a definite opinion that such a prescription would be good, and approved of the decision of Malins V.-C. in *Lanfranchi* v. *Mackenzie*[1] to that effect. In the revised version of his judgment this has been excised.

It seems to me that the *question* may mean one of two things.

(1) Can a dominant owner prescribe for the access of an extraordinary amount of light to his windows? or

(2) Can he prescribe for an extraordinary user of that light after it has passed through the windows?

As regards the first point may I again reiterate that the dominant owner in every prescriptive claim to light claims that amount of light which in fact has reached his windows and neither more nor less. Either more or less would be a bad claim according to the general rules governing prescription. As regards the second point: as it is clear law that the non-user of light does not disentitle the owner to it, it would seem that an extraordinary user of it, *unknown to the servient owner*, could not possibly entitle him to complain of an obstruction which would not be a nuisance in itself. It is just conceivable that there might be cases when the nature of the user of the light claimed, as well as the volume of it, might be asserted

[1] (1867) L. R. 4 Eq. 421.

by the dominant as against the servient owner by the exhibition of trade notices or the like. Or, again, the situation of the dominant tenement might be in a neighbourhood notoriously occupied by persons who plied a particular trade which required a good light—as of old were the watchmaking and silk-weaving quarters of London. In such cases it is possible that, in considering whether the obstruction complained of amounted to a nuisance, one circumstance to be taken into account should be the particular user of the premises. It does not seem conceivable, however, according to the general law governing prescriptive claims, that an exceptional user unknown to the servient owner could be asserted against him.

It is true that in *Ambler* v. *Gordon*[1] Bray J. decided that no user by the dominant owner, whether with or without the knowledge of the servient owner, could give rise to such a prescriptive right as would enable the dominant owner to assert that to be a nuisance which otherwise would not be such. But I do not understand that very learned judge to say, at all events where a whole neighbourhood carried on a trade requiring exceptional light, that that circumstance should not be taken into account at all in an action for nuisance to lights.

FRANCIS R. Y. RADCLIFFE.

[1] [1905] 1 K. B. 417.

THE TRUE NATURE OF AN EASEMENT.

IN the last number of the LAW QUARTERLY REVIEW Mr. Arthur Underhill puts the question, 'Can an easement be granted in perpetuity without words of limitation?' and he answers it in the affirmative. He is probably right, but the question is not free from doubt.

In the first place, the true nature of an easement is a matter of dispute, for the old books do not say much about it. Lord Coke gives a short description of the different kinds of ways (Co. Litt. 56 a) without telling us what the nature of a right of way is. He also refers more than once to incorporeal hereditaments (or incorporeate inheritances), and gives as examples, 'advowsons, commons, &c.' (Co. Litt. 9 a), 'advowsons, rents, commons, estovers, &c.' (49 a, 169 a); but in none of these passages does there seem to be any reference to ways or other easements as belonging to the class of incorporeal hereditaments. The only passage throwing any light on the point under discussion which I can find is the remark (Co. Litt. 237 b) that the rule as to descents tolling entries applies only to 'such tenements as be corporeall, and do lye in livery,' and not to 'inheritances which lye in grant, as advowsons, rents, *commons in grosse*, and such like, which be inheritances incorporeall.' It seems to me that Lord Coke would not have especially mentioned commons in gross without good reason, and that, if we apply the rule *inclusio unius*, &c., to what he says, we may safely assume that commons appendant and appurtenant were not, in Lord Coke's day, regarded as incorporeal hereditaments. Now the essential difference between a right of common in gross and a right of common appendant or appurtenant is that the first has a separate existence and the other two have not. If this is the test, an easement is not, according to Lord Coke, an incorporeal hereditament, for it can only exist as appurtenant to land. This conclusion seems to be strengthened by the rules of descent under the old law (Watkins on Descent, 61 seq.). And if a perpetual easement is not a hereditament it seems to follow that words of limitation are not required for its creation.

Mais nous avons changé tout cela. In Blackstone's Commentaries[1]

[1] Vol. ii, p. 35.

(1765) ways are classified as incorporeal hereditaments. So in Blythewood and Jarman's Conveyancing[1] (1827). Later text-writers (with the exception of Mr. Challis) classify all easements as incorporeal hereditaments[2], and there are numerous modern decisions which assume, as a matter too clear for argument, that an easement (or at all events a right of way) is an incorporeal hereditament[3]. In the Encyclopaedia of Forms and Precedents (vol. v, pp. 495 seq.) it is stated as the result of these decisions that an easement is an incorporeal hereditament and a tenement.

It is difficult to account for this change, but it may have arisen from a misconception on the part of Blackstone or later text-writers. He classifies not only commons in gross, but also commons appendant and appurtenant, as incorporeal hereditaments, although this is probably inaccurate, if the passage already cited from Coke bears the interpretation above suggested. In treating of ways (the only rights in the nature of easements which he notices) Blackstone gives as an example a right of way granted to a man for life as a personal right, but does not refer to perpetual ways in gross, although such rights were recognized by law in his time. In the Termes de la Ley (1629) under *Chimin* the author thus distinguishes between ways in gross and ways appendant:—

'A way in grosse may bee that which the Civilians call personall, as when one covenanteth for a way through the ground of another man, for himselfe and his heirs. A way appendant on the other side may be that which they call reall, as when a man purchaseth a way through the ground of another man for such as doe dwell or shall dwell in this or that house, or that be the owners of such a manor for ever[4].'

Ways in gross are also referred to by Dodridge J.[5] and by Chief Baron Gilbert[6]. In *Senhouse* v. *Christian*[7], where a way in gross was granted to the ancestor of the defendant, his heirs and assigns, no question was raised as to the validity of the grant, or as to the title of the defendant to the way by descent from the original grantee: the only question was as to the nature of the acts authorized by the grant[8]. A way in gross, if granted to a man

[1] First ed., vol. iv, p. 221.

[2] Joshua Williams (R. P., 3rd ed., p. 265); Davidson (Prec. in Conv., vol. ii, pt. i, p. 548, n.); Leake (Prop. in Land, 53); Goodeve (R. P., 1st ed., p. 351).

[3] *Hill* v. *Midland Railway*, 21 Ch. D. 143; *Great Western Railway* v. *Swindon &c. Railway*, 22 Ch. D. 677; 9 App. Ca. 787; *M'Manus* v. *Cooke*, 35 Ch. D. 681; *Jones* v. *Watts*, 43 Ch. D. 574; *Lord Hastings* v. *North-Eastern Railway* [1898] 2 Ch. 674; [1899] 1 Ch. 656; [1900] A. C. 260.

[4] It will be noticed that according to this description words of limitation are required for the creation of a perpetual way in gross, but not for the creation of a way annexed to land, thus confirming the conclusion arrived at above (p. 259).

[5] W. Jones, 127. [6] Uses, 281. [7] 1 T. R., 560.

[8] A way in gross does not seem to be an easement: see the definition of that word in the Termes de la Ley, according to which an easement is a right which

and his heirs, is clearly an incorporeal hereditament, and this probably accounts for the fact that in the Termes de la Ley [1], Blackstone, and other old books, 'ways' are included among incorporeal hereditaments. If this is the true explanation, it seems to follow that modern writers and judges have been somewhat hasty in classifying easements as incorporeal hereditaments. The law, however, is, it is submitted, clearly so settled.

It is this change in the legal conception of the nature of an easement that makes it difficult to answer Mr. Underhill's question, for if a perpetual easement is not only a hereditament, but a tenement (as was held by Byrne J. and the Court of Appeal, and taken for granted by the House of Lords in the case of *Lord Hastings* v. *North-Eastern Railway*, above cited), how can it be created without words of limitation? Coke tells us that a right of way lies in grant (Co. Litt. 169 b), and that if one grants lands or tenements, advowsons, commons or the like, and expresses or limits no estate, the grantee takes only an estate for life (Co. Litt. 42 a). Words of limitation are required to make an estate of inheritance in all feoffments and grants (Litt. s. 1). So that we are met with this difficulty: supposing that (as appears to be the case) a perpetual easement could under the old law be annexed to a piece of land without words of limitation, for the reason that such a right was not an incorporeal hereditament, does the same rule apply now that easements have been held by high judicial authority to be incorporeal hereditaments? Personally I agree with Mr. Underhill that words of limitation are probably not required for the creation of a perpetual easement, even at the present day, but it would require some courage to express a confident opinion on the point.

I cannot find anything in the decision of Byrne J. in *Rymer* v. *McIlroy* [1897] 1 Ch. 528, to justify the conclusion which Mr. Underhill draws from it. The decision seems to have been more or less anticipated by Mr. Justice Willes [2].

Mr. Underhill thinks that the practice of conveyancers in using words of limitation in the creation of easements *de novo* has been merely *ex abundanti cautela*. No doubt caution is (or formerly was) the badge of all our tribe, but in this particular case it seems to be justified. If Mr. Underhill were instructed to settle a deed granting an easement *de novo*, it is fair to assume that he would adopt one

implies the existence of a servient and a dominant tenement. A learned note on ways in gross by Mr. (afterwards Mr. Justice) Willes is to be found in Gale on Easements.

[1] Sub v. *Enheritance* or (in the later editions) *Inheritance*: 'Inheritance incorporate are advowsons, villaynes, wayes, commons, courts, fishings, and such like that are or may be appendant or appurtenant to inheritance corporate.' The words 'that are or may be' are somewhat obscure.

[2] See his addition to Gale on Easements, 11.

of the forms set forth in the fifth volume of the Encyclopaedia of Forms and Precedents, and limit the easement to the grantee, his heirs and assigns. In other words, he would not care to make a doubtful experiment at the risk of his client. That is why I took exception to Mr. Brickdale's form [1].

A word as to the decision in *Re Brotherton's Estate* [2] referred to by Mr. Underhill. In that case there were two adjoining settled estates, each of which had appurtenant to it a right of way over the other; the tenants for life desired to put an end to these easements, and applied to the court to sanction an exchange of them under the Settled Land Acts by mutual conveyances, the effect of which would have been to extinguish the easements. It was contended that as tenants for life can exchange 'land,' and as 'land' in the Settled Land Acts includes incorporeal hereditaments, it follows that they can exchange easements. Joyce J. refused the application. He expressed his approval of Mr. Challis's view that easements are not incorporeal hereditaments, but rights appurtenant to corporeal hereditaments, a view which I venture to think was correct in the days of Lord Coke, but is no longer so, having regard to the decisions cited above [3]. Terms of art occurring in an Act of Parliament must be construed according to the sense in which they were understood by experts at the time the Act was passed, and the expression 'incorporeal hereditament' in the Settled Land Act must be construed in the sense commonly attributed to it by conveyancers and judges in 1882, not with reference to its meaning in 1628.

There are passages in the judgment of Joyce J. which seem to imply some doubt in the mind of the learned judge whether, in a case where the owners of two adjoining estates have easements over one another's lands, cross releases of the easements can be considered an exchange of easements, and whether such a transaction ought not properly to be described as an exchange of releases. If the suggested difficulty arises from the fact that when an easement is released to the owner of the servient tenement it is extinguished, the doubt is not well founded; it was suggested and rejected nearly three hundred years ago, for in Perkins's Profitable Book (ss. 266–7) we read:—

'If a man release his estovers, which he hath yearly to take in a wood, &c., and deliver the release in exchange for land given to him in exchange for the same release, it is a good exchange; and yet the release takes effect by way of extinguishment of the estovers. But it is as good advantage and profit to the tenant

[1] Land Transfer Acts (2nd ed.), 590. [2] [1907] W. N. 230; [1908] W. N. 56.
[3] Page 260, note 3.

to be discharged of them, as if so many estovers had been granted to him, &c. And so shall it be if I have a rent issuing out of the land of J. S., &c., and I grant or release the same rent to J. S. in exchange for other land, tenement, rent, or common, &c., or to have a way over his lands to go, &c. Yet it is said by some, that in every exchange there ought to be a transmutation of the possession, &c., of the one exchanger into the other exchanger, otherwise the exchange is not good: but this saying is not true as appears by the cases last aforesaid.'

So in *Re Brotherton's Estate* it would have been 'good advantage and profit to the tenants to be discharged' of the easements.

It is therefore submitted that both the grounds given for the decision are erroneous.

CHARLES SWEET.

THE CREATION OF EASEMENTS.

IT is respectfully submitted that the following arguments advanced by Mr. Underhill in his interesting article printed in the last number of this REVIEW (L. Q. R. xxiv. 199) may be answered in the manner subjoined.

1. That there is 'not a scrap of authority' in support of the proposition that proper words of limitation are necessary to create an easement in fee:—Certainly no case has been found, which decides the exact point. But there seems to be considerable authority in favour of drawing that conclusion. First, it appears from Litt. s. 1 and Co. Litt. 9 a, b, 307 a, that of things which lie in grant, as well as of things which lie in livery, an estate of inheritance cannot be conferred without using the proper words of inheritance (his heirs). Coke enumerates the exceptions to this rule (Co. Litt. 9 b, 10 a), and apparently intends the list of exceptions given to be exhaustive; but he does not mention the grant of an easement among them. Then in *Hewlins* v. *Shippam*[1] it was expressly laid down (1) that there may be a freehold interest in an easement such as the privilege of laying a drain on another man's land and causing foul water to flow through it; (2) that the grant of such a privilege to a man, either without defining the limits of the estate given or for some specified time of uncertain duration, confers upon him an estate for his life, as in the case of a similar grant of land; and (3) that a right of way or a right of passage for water is an incorporeal right and stands upon the same footing with other incorporeal rights, such as rights of common, rents, advowsons, &c., and lies not in livery but in grant, and a freehold interest in it cannot be created or passed without deed. The case therefore seems to stand thus: Words of inheritance are necessary for the grant of an estate in fee simple in things which lie in grant. Easements are things which lie in grant. The conclusion to be drawn seems obvious.

2. That easements are not tenements, and cannot be the subject of tenure:—But are they not tenements within the statute *De Donis*? How else can they be entailed (as in everyday practice they are) along with the lands which constitute the dominant tenement[2]? Does the grant of an easement to a tenant in tail of the proposed dominant tenement and the heirs of his body give him a fee simple conditional? It seems to have been considered formerly that easements might be of two kinds—personal privileges in gross and servitudes annexed to land—and that the former kind were not,

[1] 5 B. & C. 221, 228, 229.

[2] See Co. Litt. 19 b, 20 a.

but the latter were, tenements[1]. In modern times it is not allowed that there can be an easement in gross[2].

3. That an easement is not a hereditament:—In *Re Brotherton*[3] it appears that the Court of Appeal impliedly held that an easement is an incorporeal hereditament, and overruled Joyce J. on this point; for they agreed that it might be sold as such under the Settled Lands Acts; though it seems that they doubted (oddly enough[4]) whether an easement can be exchanged. In what respect does an easement fail to fit in with the definition of hereditament given in Co. Litt. 6 a? Though an easement may not now exist in gross, it has nevertheless a separate existence in law; it is no *part* of the dominant tenement.

4. That a freehold *in futuro* may be granted in an easement:—This is equally the case with such incorporeal hereditaments as rents. The just inference appears to be that easements are subject to the same rules in all respects as they are.

5. That the creation of an easement is a matter of intention, because a perpetual easement may be created by a mere covenant, and no amount of intention is sufficient to pass the fee in corporeal hereditaments:—But the real gist of the cases cited by Mr. Underhill[5] is that, in a deed of grant, the word *grant* need not be used if other words expressive of the intention to grant are employed. The same rule is applied to grants of the reversion of corporeal hereditaments[6]:—It does not predicate anything with respect to the *quantum* of estate to be conveyed, and is entirely independent of the rule requiring words of inheritance to confer an estate in fee. It is significant that in every one of the cases cited by Mr. Underhill the covenant proved or pleaded was that the claimant *and his heirs* should have the easement alleged.

The rule requiring proper words of limitation to create an estate in fee is maintained with the utmost rigour[7]. It is submitted that, having regard to the present state of the authorities, it is clearly the *duty* of a conveyancer instructed to draw a grant of a perpetual easement to use the proper legal words of inheritance, and that, where such a grant has been made without them, the title cannot safely be accepted.

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[1] Bro. Abr. Grant, 130; Vin. Abr. Grant (T, pl. 5); Termes de la Ley, s. v. Easement; and see 2 Black. Comm. 35.

[2] *Ackroyd* v. *Smith*, 10 C. B. 164; *Rangeley* v. *Midland Ry. Co.*, L. R. 3 Ch. 306, 310, 311; *R.* v. *Somers* [1906] 1 K. B. 326, 329.

[3] [1908] W. N. 56; 98 L. T. 547.

[4] It is said in Shep. Touch. 292 that an exchange may be of things of the same nature or of divers natures, as a house for a rent or a rent *for a way*.

[5] L. Q. R. xxiv. 200.

[6] *Shove* v. *Pinck*, 5 T. R. 124; *Haggerston* v. *Hanbury*, 5 B. & C. 101.

[7] *Re Ethell & Mitchell & Butler's Contract* [1901] 1 Ch. 945; *Re Irwin* [1904] 2 Ch. 752.

THE KING v. *ALMON.* II.

IT has been alleged by a modern writer[1] that down to the death of Henry V cases of criminal contempt in the King's Bench were invariably dealt with according to the course of the common law, viz. by action, information, presentment, or indictment, and this statement is based upon a search through the *Rotuli coram Rege*, the Controlment Rolls, and the Year Books. The writer cites a number of instances of contempt from A.D. 1253 to 1421, including cases of abusing the judge or jury or the parties, in Court; assaulting jurymen or parties in Court; abusing or assaulting jurymen or parties on their way to Court; and shows that the procedure in every case was not summary but according to the ordinary course of law. In the case of John de Grauntsete (5 Edward III)[2] a conviction by the King's Court in Ireland of contempt *in facie* was reversed by writ of error because the offence had not been tried by a jury. The ancient practice is further proved by the case of Sir Robert de Scardeburgh, a judge, who in 14 Edward III brought an action of trespass against William Botevileyn and his wife, and subsequently brought a bill of trespass against the same defendants in respect of abuse of the plaintiff in the presence of the justices. The plaintiff prayed that inasmuch as the offence was committed in the presence of the justices they would take the inquest immediately; this was refused, but a writ was sent to the sheriff to cause twelve men to come from the neighbourhood of Westminster[3]. A very early case (A.D. 1230) shows that a person, who attended in Court at a day fixed (to answer a charge of proceeding in the Court Christian concerning a lay fee in despite of a prohibition) but departed without leave, was held to be in mercy for contempt of the Court, and his attendance was enforced by a distress upon his lands and goods[4]; but the amercement, which it will be observed was enforceable against his possessions and not against his person, seems to have been imposed to enforce obedience to the process of the Court and not as a punishment for a contempt *in facie*, for the offender could avoid the distress by complying.

[1] The late Mr. F. Solly-Flood, Q.C., in an article, 'Prince Henry of Monmouth and Chief Justice Gascoign,' Trans. Royal Hist. Soc. (1886), vol. iii. N. S., at p. 147.
[2] Coram Rege Rolls, M. 5 Edw. III, m. 128.
[3] Year Books, by Pike, 14 Edw. III, pp. 322, 324, 326.
[4] Bracton's Note Book, by Maitland, ii. p. 365, case 464.

The following are later instances of the punishment of contempt *in facie*, in the ordinary course of law. In *Davies'* case (1 Edward IV)[1] a man, who struck another in the presence of the Court and threatened to hang him if he gave evidence, was indicted. The same procedure was followed in the reign of Elizabeth, where a man drew his sword on the stairs of the Court of Requests and resisted the sheriff, who was making an arrest[2]. In 1605, one Bellingham jostled Anthony Dyer with his elbow and shoulder out of malice in Westminster Hall *sedentibus curiis*, so that he overthrew him and with his feet spurned him upon the legs, but did not smite him with his hand or any weapon. Held upon indictment that the offender's right hand should be cut off[3]. Indictment was the procedure in *Harrison's* case (1638)[4], where the offender rushed to the bar of the Common Bench when the Courts were sitting and cried out:—'I accuse Mr. Justice Hutton of high treason.' Again, 'It was resolved that if a counsellor at law in his argument shall scandal the King or his government, this is a misdemeanour and contempt to the Court; for this he is to be indicted fined and imprisoned[5];' and a barrister was indicted and fined for saying a Baron of the Exchequer was a judge *de gratia*[6]. In a case referred to in Dyer's Reports[7], a prisoner condemned for felony at the Salisbury assizes in 1631 threw a brickbat at the judge which narrowly missed. An indictment was immediately drawn by the Attorney-General, and the prisoner's right hand was cut off and fixed to the gibbet on which he was hanged in the presence of the Court. Here the cutting off the hand was to punish the contempt of which he had been convicted; the hanging must have been the sentence upon the previous conviction of felony.

One other early case remains to be mentioned, viz. the alleged committal of Prince Henry of Monmouth by Chief Justice Gascoign, of which no record or authoritative report has been discovered. The argument for the truth of the story has been elaborately stated by Lord Campbell[8] and its correctness was assumed by Lord Selborne C. in *Watt* v. *Ligertwood*[9]. On the other side the result of Mr. Solly-Flood's researches has been stated even more elaborately in the article referred to above, and his conclusion that the story is a myth seems to be unanswerable[10].

[1] Dyer, 188 (10).
[2] *Carus'* case (1595), Owen 120.
[3] Cited in *Oldfield's* case (1611), 12 Rep. 71.
[4] Cro. Car. 503.
[5] *Fullers'* case (1609) 12 Rep. 41.
[6] Cited by Siderfin, Pt. i. p. 271.
[7] 188 b, note.
[8] Lives of the Chief Justices, i. 125.
[9] (1874) L. R. 2 H. L. Sc. at p. 367 n.
[10] Trans. Royal Hist. Soc., vol. iii. N. S., p. 47. See also Stubbs, Const. Hist., iii. 78, and Dict. Nat. Biog., xxi. 46; xxvi. 46. But see contra Wylie, Hist. Eng.

Hawkins, in the passage already referred to[1], seems to throw doubt on the jurisdiction to punish contempts *in facie* by imprisonment. He says that all courts of record may enjoin the people to keep silence under a pain and impose reasonable fines not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the Court as by giving opprobrious language to the judge or obstinately refusing to do their duty as officers of the court; and 'it is said' that all such courts except the court-leet may also imprison all such offenders[2].

Libels and slanders upon courts and judges were not unknown in early days, and the reports indicate the procedure adopted in such cases. In the case *De libellis famosis* in the Star Chamber (3 James I)[3], where the offence was libelling the Archbishop of Canterbury, Coke says:

'A libeller (who is called *famosus defamator*) shall be punished either by indictment at the common law or by bill if he deny it or *ore tenus* on his confession in the Star Chamber; and according to the quality of the offence he may be punished by fine or imprisonment, and if the case be exorbitant by pillory and loss of his ears. . . . If it be against a magistrate or other public person it is a greater offence.'

Coke makes no reference to a summary process in the common law courts in these cases. In *Wraynham's* case in the Star Chamber (16 James I)[4], where the defendant was charged with a libel on Lord Bacon, Coke in his judgment cites precedents of libelling judges, of which the following are in point: Mich. 18 Edward I, Rot. 151, *Coram Rege*—Thomas Wilbraham petitioned against the Justices of the King's Bench 'that they had not done according to law and reason,' the petition being delivered to the King and his Council. For this Wilbraham was indicted, convicted, fined, and ransomed in the King's Bench. Year Books, Lib. Ass. xix. 5[5]—Robert Hovel sued by petition to the King that an assize was awarded against him contrary to law in the King's Bench, and that some of the justices awarded the assize contrary to the unanimous opinion of their fellows. The bill of petition was sent by direction of the King to Sir William Scot, Chief Justice of the

under Henry IV, iv. 94-9. And see Elyot's Boke named the Governour, ed. by Croft (1880), ii. pp. 61-72, 643, 644.

[1] Page 191, Part I, *supra*.

[2] Hawkins is no doubt referring to a sentence of imprisonment apart from a fine; there could be no question about the right to enforce payment of a fine by imprisonment. See *Beecher's* case (1609), 8 Rep. at p. 59 b.

[3] 5 Rep. 125. [4] 2 How. St. Tr. 1074.

[5] See Year Books by Pike, 19 Edw. III, p. 138, from which the statement of the case is taken. In *Wraynham's* case the name Hovel appears as 'Hunney,' and the reference to the Lib. Ass. is incorrect.

King's Bench, who said that this suit was a slander against the Court in so surmising dishonesty in its justices. Therefore Robert was ordered into custody and was put on mainprise to answer to the King. What were the subsequent proceedings, if any, does not appear. It would seem that the offender was liable to indictment under the Statute of Westminster I (3 Edward I), c. 34, which provides for the punishment by imprisonment of 'devisors of tales whereby discord or occasion of discord' may 'arise between the King and his people or great men of this realm.' A similar case of libel in 18 Edward III on the same Chief Justice is referred to by Coke in 3 Institutes 174. John de Northampton, an attorney of the King's Bench, being charged with writing a letter to a member of the King's Council reflecting on the Chief Justice and his fellow justices, confessed the letter to be written with his own hand, and the Court adjudged that the letter contained no truth in it and was calculated to excite the King's indignation against the Court and the judges to the scandal of the said Court and judges. John was committed to the marshall, and afterwards found sureties for his good behaviour. This case will not establish the jurisdiction to punish a libel on the Court by fine or imprisonment upon summary process. The terms of the judgment seem to point to a proceeding under the Statute of Westminster I (3 Edward I), c. 34[1], where the defendant by his confession had waived his right to trial by a jury. The sentence was not fine or imprisonment but binding to good behaviour, the exercise of a jurisdiction which at common law, in the absence of confession, seems to have implied conviction by the verdict of a jury[2].

In 8 Elizabeth, one Welch was indicted for saying: 'My Lord Chief Justice Catlyne is incensed against me; I cannot have justice nor can be heard, for that Court (the King's Bench) now is made a court of conscience[3].'

In *Milton's* case (*temp.* James I [?]), cited by Vaughan C. J. in *Bushell's* case[4], George Milton 'imprisoned for contempt, scandalous words of the Court, and convicted of drunkenness,' was discharged by *habeas corpus*, the causes being resolved insufficient.

In 5 Charles I, one Jeffes was charged with an infamous libel directed to the King against Sir Edward Coke, late Chief Justice and the Court of King's Bench, and was punished by that Court upon indictment by pillory, imprisonment, and fine, and was bound with sureties for his good behaviour[5].

[1] Cf. the case of *Thomas Bradbrook* (18 Edw. III) cited by Noy in *Tanfield* v. *Hiron* (1624) Godbolt, 405.
[2] See Burn's Justice of the Peace, 30th ed., v. 762.
[3] Cited by Mountague C. J. in *Wraynham's* case (1618) 2 How. St. Tr. 1080.
[4] (1671) Vaughan at p. 154.
[5] Cro. Car. 175.

In 32 Charles II, Elizabeth Cellier was indicted at the Old Bailey 'for writing and publishing a scandalous libel containing some reflections upon the administration and the judge in relation to the popish plot[1].'

An instance of an action for slander of a judge in his judicial capacity will be found in *Harrison's* case (1638)[2].

In 1679, Scroggs C. J. printed speeches made by himself and Jones and Dolben JJ. in the King's Bench on a charge against Richard Radley of accusing the Chief Justice of receiving a bribe. The Court directed an information to be filed, upon which Radley was convicted and fined[3]. It was not suggested that procedure by attachment was available in this case, though a few months later Scroggs tried an experiment in summary procedure to punish a libel, which raised a great outcry and contributed to his downfall (see p. 275, *infra*).

It has been shown[4] that no instance is found earlier than the year 1720 of a proceeding against a stranger for a libel upon the Court otherwise than by indictment, information, or action at law. For the application of a procedure without a jury in such a case we must look to the Star Chamber, which, as we have seen[5], exercised a penal jurisdiction in the case of libels. The ordinary course of procedure in that Court included the examination of the defendant upon interrogatories after he had put in his answer; prosecutions by the Crown sometimes commenced with the examination *ore tenus* which was without oath, 'more short and more expeditious,' as Hudson says, 'the curious eye of the State and King's Council prying into the inconveniences and mischiefs which abound in the commonwealth[6].'

Examination by interrogatories occupies a prominent position in the history of the punishment of contempt. At the time of Almon's case, this was the mode of trying the question whether contempt had been committed. Wilmot J.[7] refers to the writ of attachment as 'so far from convicting that it only calls upon the party to answer the charge and defers the whole trial of that charge to his own oath.' In a later passage[8] he commends the procedure by examination as compared with a trial in the ordinary course of law:

[1] 7 How. St. Tr. 1043.
[2] Referred to at p. 267, *supra*. See the report in 3 How. St. Tr. at col. 1376.
[3] 7 How. St. Tr. 701. [4] Page 191, Part I, *supra*. [5] Page 268, *supra*.
[6] Hudson, Treatise on the Star Chamber, 126–7. The course of the examination *ore tenus* can be followed in *Lilburn's* case (1637) 3 How. St. Tr. 1315.
[7] *Rex* v. *Almon*, 247.
[8] Page 257.

'And in this state of the proceedings they are only putting the complaint into a mode of trial where the party's own oath will acquit him, and in that respect it is certainly a more favourable trial than any other; for he cannot be convicted if he is innocent, which by false evidence he may be by a jury; and if he cannot acquit himself he is but just in the same situation as he would be in if he was convicted upon an indictment or an information, for the Court must set the punishment in one case as well as the other: they do not try him in either case; he tries himself in one case and the jury try him in the other[1].'

According to Coke the practice of examination was introduced into the Star Chamber by the Act 3 Henry VII, c. 1[2], but Sir James Stephen thinks it existed there earlier[3]. Blackstone suggests that it was derived by the common law courts from the courts of equity[4]; at the same time he cites in proof of its antiquity a case in 5 Edward IV[5], where the record in a civil action was sent by a judge at *nisi prius* into the King's Bench. A verdict had been given for the plaintiff, and the defendants alleged that after the jury had retired to consider their verdict, and before delivering it, they had eaten and drunk, &c., and been allowed to go at large. The jurors and the bailiffs who had had charge of them attended, and were interrogated by the defendants and admitted the eating and drinking, &c., but the jurors alleged that it was after they had agreed on their verdict, and the going at large was denied. The Court allowed the verdict to stand and gave judgment accordingly, and the bailiffs and jurors were committed to the custody of the sheriff and admitted to bail. It will be noticed that the bailiffs and jurors were examined as witnesses to the facts on the question whether the verdict in a civil action should stand, and not with the special object of punishing them for their contempt, though

[1] In the common law courts if the respondent on his examination denied the contempt he was acquitted, and if he swore falsely the only remedy was a prosecution for perjury, but in Chancery witnesses might be called to contradict the respondent's evidence. The course of procedure was as follows. The defendant was brought into court by a writ of attachment or by an order to show cause why attachment should not issue, and entered into a recognizance to attend and answer interrogatories with regard to the alleged contempt. In some cases he answered in custody. At one time the examination was conducted by a judge in the King's Bench (*Savage's* case (1618) 2 Rolle 43; *Harrison's* case (1638) 3 How. St. Tr. 1373), but it was sometimes referred to an officer of the Court (*Winn* v. *Stebbins* (1649) Style, 105). The practice of referring the matter for examination has long ceased in Chancery cases, and though it is preserved in the Crown Office Rules (Rules of 1906, no. 242) it is now rarely applied, the question of contempt being decided by the Court at the preliminary hearing upon affidavits filed on both sides.

[2] 4 Inst. 63. [3] History of the Criminal Law, i. 173.

[4] Com. iv. 288. From a petition to Parliament of 3 Hen. V (Rot. Parl. iv. 84) it appears that examinations based upon the civil law were first introduced with the subpoena by John de Waltham in the time of Richard II, and that the Justices of both Benches as well as the Chancellor were occupied with examinations to the detriment of the regular business of the Courts.

[5] Rastell's Entries, 268, pl. 5.

incidentally the effect was to obtain an admission of their guilt, and the case affords a possible explanation of the manner in which interrogatories originally came to be administered to a person alleged to have committed contempt. Statutory sanction to the practice of examination upon interrogatories in a case of contempt in the common law courts seems to have been given for the first time by 43 Elizabeth, c. 6, s. 1 [1].

Hudson tells us [2] that the Star Chamber had a concurrent jurisdiction to punish contempts committed in any other Court, though this does not necessarily imply that the jurisdiction of the other Courts to punish contempts was a summary one. We know that in many cases the question of punishment was referred by the Chancery and common law courts to the Council or the Star Chamber. In *Brabson's* case (39 Edward III) [3] a bill was put in for the King and for Adam Brabson against *R.* alleging that whereas Adam was pursuing his business before the justices against *R.* the latter had made an assault upon Adam in the presence of the justices in disturbance of his suit, and had taken from him his wife and certain chattels. *R.* pleaded not guilty, and upon inquest taken *R.* was found guilty to amount of £10 damages, and was ordered into the custody of the sheriff, and as to the fine and what should be done further with regard to the King for the assault made

[1] Fuller in his Church History (v. 107) in treating of the Court of High Commission puts some of the arguments for and against the oath *ex officio* as follows: 'Against.—The common laws have ever rejected and impugned it; never put in ure by any civil magistrate in the land, but as it is corruptly crept in amongst other abuses by the sinister practices and pretences of the Romish prelates and clergymen. And when loss of life, liberty, or good name may ensue, the common law hath forbidden such oath. . . . For the oath.—It is true to give this oath to the defendant in causes of life and death is contrary to the justice of the land; but where life or limb is not concerned it is usually tendered in Chancery, Court of Requests, Council of Marches, and Council in the North—yea, in other courts of record at Westminster, where the Judges (time out of mind) by corporal oath did examine any person whom in discretion they suspected to have dealt lewdly about any writ, return, entry of rule, pleading, or any such like matter, not being capital.'

The writer of a pamphlet entitled 'Another letter to Mr. Almon,' &c., published in 1771 (Brit. Mus.), compares the examination by interrogatories to the procedure of the Inquisition (pp. xxiv, xxx): 'By what all the books say this interrogation was introduced for the defendant's own purgation or purification, somewhat upon the same principle with the old wager at law. The judges constantly declare it is meant as a favour to him, and that it was originated for this purpose I have not the least doubt. But as managed at present it is a downright Inquisition. . . . "You are a heretic; come and confess your sins that I may inflict suitable punishment upon you. If you do not I will put you to death for not confessing them. I act out of regard to your own soul." This is the language of the sanctimonious Inquisition. The legal questioner says: "I have seized you because you are a defier or breaker of the law. Submit to avow upon oath your crime that I may have indisputable ground for proceeding to some penal sentence against you. If you do not I will confine you to a prison the rest of your days for refusing. It is from a principle of mercy that I proceed throughout."'

[2] Star Chamber, 117.

[3] Y. B. Lib. Ass. xxxix. 1.

in the presence of the justices they would consult with the King's Council. The case of Richard de C. who struck a juror at Westminster is cited, wherein it is said that an award was made by the whole Council that his right hand should be cut off, and his lands and goods forfeited to the King[1]. The following are instances from the earliest existing records of the Star Chamber of the punishment by that Court of contempts of the common law courts; there are also numerous instances of punishment by the same authority of contempts of the Court of Chancery. From List of Proceedings in the Court of Star Chamber in the Public Record Office, vol. i: Forcible escape when arrested by order of the King's Bench, *temp.* Hen. VIII (p. 236); misconduct on a commission of gaol delivery, *temp.* Edw. VI (p. 264); forcible ejections, &c., in contempt of a judgment of the Common Pleas, *temp.* Edw. VI (p. 282); misconduct in an indictment, *temp.* Edw. VI (p. 289); attempt to discredit justices and jury in a case of murder, *temp.* Ph. & M. (p. 309). From Star Chamber Cases, 1641: Saying that Chief Justice Dyer was a corrupt judge—Dyer was Chief Justice 1559–81 (p. 33). From Star Chamber Reports 1631–2 (Camden Soc. Pub., 1886). Procuring an execution out of the Common Pleas and arrest of the defendant without any previous judgment, 1631–2 (p. 148)[2].

It will be remembered that the Act for the Abolition of the Star Chamber (16 Charles I, c. 10) recites that all matters determinable in that Court may have their proper remedy and redress by the common law of the land and in the ordinary course of justice elsewhere. The Act imposed no limit on the future exercise by the courts of common law of the jurisdiction which it abolished in the case of the Star Chamber, and seems to have been so framed as to leave this an open question. Herbert C. J. is reported to have said that 'the reason of disallowing the Star Chamber was because their authority was before and now is in B. R. and consequently that court unnecessary[3].' This seems to be giving a very liberal interpretation to the recital in the Act. Holt C. J. in more guarded language says: 'This Court (the King's Bench) hath all the lawful power that the Star Chamber had[4]'; and Blackstone, with equal caution, remarks that into the Court of King's Bench hath reverted

[1] Cf. *N.*'s case, Y. B. by Pike, 19 Edw. III, p. 452.

[2] Acknowledgment is due to Wallace on the Reporters (4th ed., p. 275) for the following reference:—'When Mr. Justice Shallow, grieved by the "disparagements" of Falstaff, threatened to "make a Star Chamber matter of it," vowing that "if he were twenty Sir John Falstaffs he should not abuse Robert Shallow, Esquire—who writes himself Armigero"—he seems to have apprehended with judicial exactness the extraordinary jurisdiction of this tribunal.'

[3] *Rex* v. *Johnson* (1686) Comb. 36.

[4] *Rex* v. *Abraham* (1690) Comb. 141.

'all that was good and salutary of the jurisdiction of the Court of Star Chamber[1].' To illustrate the arguments put forward in favour of retaining the Star Chamber jurisdiction as far as might be, the following may be quoted from a manuscript apparently of the time of Charles II[2]. After enumerating forgeries formerly punished in the Star Chamber the writer proceeds:

'If it be objected that most of these forgeries may be punished by indictment at the common law; Answer: It is true they might be if they could be discovered; but it is not to be supposed that those who are such knaves to commit these offences will be also fools to call witnesses to it, and without a positive witness to prove the indictment it will never be found. But by examination of the parties themselves discoveries have been often made.'

In referring to 'conspiracies' so punished, the writer says:

'These are deeds of darkness, and if the delinquents may not be examined to accuse themselves and make discoveries either by a plain confession of the fact or by pregnant and violent presumptions no man can be safe in his life or fortune, as may appear by several particulars of this nature.'

Before the abolition of the Star Chamber the King's Bench had punished a grave form of contempt summarily, but the report seems to indicate an attempt to establish a jurisdiction of doubtful legality; for perjury in giving bail, upon confession without trial, a man was adjudged to be committed to prison and to stand upon the pillory with a paper mentioning his cause and to be brought to the Courts of King's Bench, Common Pleas, and Exchequer. The report says that his confession was recorded in court 'without other proceedings against him[3].'

When by the abolition of the Star Chamber the whole jurisdiction over libels had passed to the King's Bench, the only procedure to punish them was by indictment or information, or redress might be obtained by action at law. It was argued, though unsuccessfully, in *Prynn's* case[4], that indictment and not information was the proper form of prosecution in a case of riot. In that case Hale C. J. was quoted as having said: 'If ever informations came in dispute they could not stand but must necessarily fall to the ground.' If Hale thought it illegal to try a man by twelve jurors instead of twenty-four or more, what would he have said to a trial without a jury?

[1] Com. iv. 266.

[2] 'A short view of criminal causes punishable and heretofore punished in the Court of Star Chamber in the times of Queen Elizabeth, King James, and his late Majesty King Charles.' Bodleian, Tanner MSS., No. 300, fo. 249.

[3] *Royson's* case (1629) Cro. Car. 146; see also *Lesser's* case (1618) Cro. Jac. 497; *Higgins* v. *Sommerland* (1614) 2 Bulstr. 68.

[4] (1691) 5 Mod. at p. 460.

In 1680 Scroggs C. J. tried the experiment of granting a rule at large, viz. that 'The Weekly Packet of Advice from Rome' which contained reflections on the King and the Duke of York should no longer be printed or published by any person whatsoever, and he afterwards committed the editor for a breach of the rule. Roger North tells us that this proceeding 'made a great noise,' and was characterized as 'such an illegal invasion of property as had not been heard of since William the Conqueror.' Upon this was based one of the articles of Scroggs's subsequent impeachment. North thinks the rule was grounded on the law which abolished the Star Chamber, but he points out that although it is therein declared, or the Judges had resolved, that all jurisdiction which the Star Chamber might lawfully exercise rested by law on the Court of King's Bench, it might be said that in such cases the King's Bench must proceed by indictment or information [1].

A treatise entitled 'The Doctrine of Libels Discussed and Examined,' published in 1728 [2], commenting (p. 172) on the severity of the sentences in Dangerfield's and Baxter's cases [3], shows how the King's Bench was influenced by the Star Chamber practice in dealing with libels after the abolition of the latter Court: 'Whatever might be the practice of the King's Bench in earlier times, we find that latterly it has followed the examples laid down by the Star Chamber for punishing variously according to the nature of the offence, more especially since the suppression of that Court when the King's Bench found left to itself the correction of a great many enormities which before were punishable in the Star Chamber.' And again (p. 134) referring to the case of *Rex* v. *Johnson* [4]: 'One would think that the King's Bench by copying so closely after the Star Chamber in this reign, had a mind either to wipe away or justify the character of cruelty and severity with which that Court was charged [5].' The same treatise cites a number of cases of libel from the reports, including libels on the Court, punished by indictment or information, down to the first year of Queen Anne, but contains no suggestion of the application of a summary process.

In applying the summary process in and after the year 1720, the Courts were perhaps reflecting the practice of the House of

[1] Examen, 564; 8 How. St. Tr. 165.
[2] Issued anonymously, but evidently the work of a lawyer. A second edition with few variations, entitled, State Law or the Doctrine of Libels, &c., was published without date.
[3] (1685) 3 Mod. 68, 69.
[4] (1686) 2 Show. K. B. 488.
[5] Cf. Starkie on Slander and Libel, 2nd ed., I, xxxi, n., as to the doctrines of the civil law borrowed by the Star Chamber and, on the abolition of that Court, by the courts of common law.

Commons in the later Stuart period when commitment for breach of privilege by libels was frequent[1]. In the case of the Kentish Petition[2] a Committee of the House reported their opinion that to assert the House of Commons have no power of commitment but of their own members tends to the subversion of the constitution of the House, and that to print or publish any books or libels reflecting upon the proceedings of the House or any member thereof for or relating to his service therein is a high violation of the rights and privileges of the House. At the conference between the two Houses in the case of Ashby and White in 1701 the Commons reasserted their right to commit for breach of privilege persons not members of the House, and the Lords in answer said that they never disputed that right[3]. It may be therefore that while the Select Committee in Burdett's case in 1810 based their argument for the right to commit for libels on the analogy of the superior Courts of Justice, the fact was that the Courts had borrowed the practice from the House of Commons.

It may also be suggested that in applying attachment to the case of a libel the Court was acting by analogy to the process in the case of slander on the Court on the service of process. On examining the list of precedents furnished by the Select Committee in 1810, we find that the first case is that of John de Northampton, an attorney, in 18 Edward III; the next four cases, extending from 11 Anne to 6 George I, are cases of slander connected with the service of process; and then follows the first instance of a libel, viz. that of Wilkins in 1720. The sequence of cases leads to the supposition that when slander was corrected by the summary process it was considered that libel was *a fortiori* so punishable—ignoring the distinction between a direct obstruction to the course of justice in executing a particular process, and an indirect obstruction which operated only by tending to bring the general administration of justice into disrepute, and which after the abolition of the Star Chamber, and down to 1720, had invariably been punished by information or indictment.

The development of the summary jurisdiction to punish contempts, so far as it can be gathered from the authorities cited above, may be shortly and tentatively stated as follows. Originally the superior courts of common law had jurisdiction to punish disobedience to the King's writ summarily by fine and imprisonment upon attachment, and probably also a disciplinary jurisdiction over

[1] See Appendix A to the Report of the Select Committee in Burdett's case referred to p. 184, *supra*.
[2] Commons Journals (1701), xiii. 767.
[3] Lords Journals (1701), xvii. 709, 714.

their own officers exercisable summarily. The Court of King's Bench had jurisdiction on indictment or bill[1] to punish contempts *in facie*, obstructions to the service of process, other obstructions to the administration of justice, as by libelling the Court or a judge[2] or assaulting a party on his way to the Court, and deceit or collusion in connexion with pending proceedings. In later times—perhaps in or after the Tudor period—the common law courts gradually established a summary jurisdiction over most of those contempts which had been formerly the subject of indictment or bill, but this did not extend to libels on the Court or judges which were still punished by indictment or by proceedings in the Star Chamber, and upon the abolition of that Court, by information or indictment in the King's Bench. The Council or the Star Chamber as representing the Council, had always exercised a concurrent jurisdiction to punish contempts of other Courts, and, as the Star Chamber records show, had exercised it largely. Upon the abolition of that Court a large portion of its jurisdiction devolved upon the King's Bench, and libels, including libels upon Courts and judges, were punished by information or indictment down to the early part of the eighteenth century. In 1720 is to be found the earliest recorded case of libel or slander on the Court or a judge by a stranger, unconnected with the service of process, being punished by attachment.

Whether the Court of Chancery exercised the jurisdiction to punish libels by summary process before the time of Lord Talbot (1733–7) is open to doubt. If that Court did possess such a power it devolved upon each branch of the High Court of Justice when the Judicature Acts came into operation, and thereby became exercisable by the King's Bench Division; but the object of this paper has been to show that such a jurisdiction cannot be founded upon the case of *Rex* v. *Almon*. The judgment in that case seems to have been based rather upon what the Court considered the practice ought logically to be than upon what it actually was; the principle upon which it is based could not be supported on the ground of immemorial usage—but only by re-establishing the jurisdiction of the Star Chamber to try without a jury, which the common law judges had not claimed to exercise until eighty years after the Court had ceased to exist.

The arguments of Wilmot J. as to the antiquity of attachment may be fully conceded; but for the present purpose it is necessary to contend that he was wrong in supposing that a summary process

[1] See the reference to Hale's Discourse, 196, Part I, *supra*.
[2] See the case *De libellis famosis* referred to at p. 268, *supra*.

was originally applied otherwise than to enforce the King's writs or to preserve discipline amongst the officers of the Court.

Again, the immemorial usage of the common law courts to punish other contempts cannot be disputed, but it has here been attempted to prove that the jurisdiction was originally not a summary one but only exercisable in the ordinary course of law.

One other point should be noticed. The later cases founded upon *Rex* v. *Almon* of necessity cover wider ground. When the judgment in that case was written the process of attachment for libel in effect withdrew from a jury only matters of fact required to be proved by evidence; after the Libel Act, 1792[1], the effect of applying the summary process was to withdraw from a jury the question whether the publication was libellous[2].

JOHN CHARLES FOX.

[1] 32 Geo. III, c. 60.

[2] Cf. *Hart and White's* cases (1808) 30 How. St. Tr. 1131, 1193. In the case of *The United States of America* v. *Judge J. H. Peck* (not found, it is believed, in the ordinary reports, but reported verbatim in an octavo volume of some 600 pages, by Arthur J. Stansbury, Boston, 1833), the case of *Rex* v. *Almon* is very fully examined and discussed. The defendant was impeached before the Senate of the United States in 1830 of granting an attachment against an attorney and counsellor who had published a newspaper comment on a judgment of the Court, and sentencing him to twenty-four hours' imprisonment and suspension from practice for eighteen months. In the result the judge was acquitted, twenty-one senators voting him guilty and twenty-two not guilty. Some of the arguments, and especially those of Henry R. Storrs, a distinguished member of the New York bar and one of the managers of the impeachment (see pp. 372 et seq. of the report), confirm the opinion that the foundation of the summary procedure for libels on courts is only to be discovered in the practice of the Star Chamber.

OTTOMAN LAND LAW IN CYPRUS.

CYPRUS, although under British administration since 1878, still remains a part of the Ottoman Empire. Ottoman law in force at the date of the occupation constitutes the main substance of Cyprus law, but the *corpus juris* has been augmented by a fairly thick book of laws and a few Orders in Council passed since.

The land law is to be found in the Ottoman Land Code of 1858, supplemented, amended, and explained by decrees, regulations, instructions and vezirial letters. Where specific legislation is silent the common law of the Ottoman Empire must be referred to, and this we find in the Moslem Sacred Law. The Turks follow the Hanifite school of authority, and the book most used for reference in the Courts is a more or less convenient code known as the Mejellé, which is published as an official textbook. This has been translated into English by Chief Justice Tyser. The land law remains for the most part unchanged since the British occupation, except so far as alterations in matters of detail and administration have been found necessary or convenient. It has received a certain impression from the decisions and practice of British judges, who have put their own interpretation on the Ottoman law.

In this article it is not proposed to discuss the origins and history of the law, but to give a brief sketch of what the law now is as administered in the island. Nor would it be practicable in so short a space to deal with that part which is concerned with the land held by Moslem religious foundations, and which is to be found elsewhere than in the Land Code, although that subject is interesting enough in itself. It will be sufficient for my purpose to give an idea of that general law which mostly affects the community.

What most forcibly strikes an English lawyer, unacquainted with any other legal system than his own, on reading the Land Code, is that it regards the land primarily from the point of view of the government, while the English law regards it primarily from the point of view of the occupier. The legal rights of an English freeholder extend in theory from the surface of his holding to the centre of the earth downwards, and to the sky above, so that in theory he has as complete ownership of his portion of the planet as any legal system could devise. This ownership he may exercise over any kind of land whether it be, or be not, susceptible of

industrial user, whether it be a field, a lake, a garden, or a mountain. Over this ownership the State exercises some control in the public interest, but such is regarded as being rather of the nature of an encroachment than as an original right. Now in Ottoman law we find the State to be the original owner of all land, granting to individuals, in the public interest, such rights of ownership or occupation as are necessary for the purposes of habitation and industry, while reserving from private ownership all land not put to such uses. Moreover, except in the case of town or village holdings assimilated to personal property, all land beneath the surface is retained by the State, so that a grant of the surface does not carry a right to disturb the earth or minerals beneath it. A right to exploit minerals may be obtained, but only by way of licence or concession, and this is the subject-matter of special provisions.

By way of entering upon a classification of land we may begin with the town or village, and we there find land which more nearly resembles freehold than any other category of land under the Ottoman system. The sites of buildings with their curtilages and small enclosures used in connexion with habitation or industry are Mulk lands, and these are regarded by the law in much the same light as personal property. They pass by will like movables and the same rules of succession and limitation of actions are applied to them as to movable property. The owner of such Mulk land may build upon or below the surface as he will, so long as he avoids collision with any municipal regulation, or he may turn his house site into a field or garden without its losing its Mulk character. But Mulk, like all privately owned land, must, in order to be owned with a full legal title, be registered in the books of the Land Registry Office.

Outside the town or village this pure Mulk ownership ceases, although a somewhat similar tenure arises, which we shall notice hereafter.

We next come to that mass of land which is used for agricultural purposes and which is known as Mirié or State land. This is not held in absolute ownership by the cultivators. It is a huge State domain granted by a sort of perpetual leases to occupiers of the surface, and is subject to tithe and land tax. Except by permission of the government Mirié land may not, in strict law, be built upon nor planted, nor may the surface be destroyed by the digging of wells, or in any other manner. Nevertheless Mirié land may by permission of the government be converted into a kind of Mulk by building a permanent construction upon it or by planting a garden or a vineyard. In practice the strict rule that requires

the previous permission of the government is relaxed, and where there is no practical reason against the grant, a registered title is given for such property, although the original building or planting has been made without permission. Such registration of Mulk property upon Mirié land causes the latter to become merged in the Mulk, and inseparable from it so long as the Mulk remains. But Mirié land so merged is not the same thing as pure Mulk land in a town or village, and should the Mulk property imposed upon it perish, the land reasserts its character as Mirié, which is not the case with pure Mulk. Another instance of impure Mulk is a wheel well with its surrounding mule path. This, although made on Mirié land, becomes on registration a Mulk property, but if the well becomes disused and filled up, the site degenerates into Mirié again. It must be remembered that in the above cases the land, although in a sense dormant as regards its separate existence, remains in theory always Mirié, and in the registered title the Mulk property is described as being upon Mirié land.

Before leaving the subject of Mulk upon Mirié, a word remains to be said about the relation of trees to land. Naturally grown trees go with the land, and the occupier of Mirié may do what he wills with the wild trees upon it. But trees artificially grown or grafted belong to a higher class of property. They do not belong to the land, but are separate Mulk properties passing by inheritance or transfer apart from the Mirié, and are separately registered, whether they pass to the same owner as the Mirié or to another[1]. If a man grafts a wild olive or plants a tree upon the Mirié of another, with the permission of the latter, he may become the registered owner of it, although he has no property in the land; but if he does so without permission, the owner of the land may by legal process cause the graft or the tree to be removed; he may not appropriate or destroy it. The same rule applies to a building wrongfully erected on the land of another, or a crop wrongfully sown, and in the latter case no damages are recoverable for the trespass.

Passing from the State domain of agricultural land, we come to that land which is uncultivated and unappropriated, waste land of mountains, swamps, and stony places, wild heaths and moorlands. This is known as Mevat, or dead land, and is the property of the Crown. Without permission it may not be built upon or cultivated. When, however, Mevat land is cultivated by permission of the government, it becomes Mirié and falls permanently into that

[1] We have seen above that when trees or vines are planted on Mirié so near together as to form a garden or a vineyard, a registration for the Mulk garden or vineyard causes the Mirié to be merged for the time.

category. Forest lands are protected and administered by a special department of the government.

Lastly, we come to that land which is left apart for public uses and is called Metrouké. Such includes roads and public places, public threshing-floors, the beds of rivers, and, according to the Land Code, pastures assigned to villages. It is doubtful, however, whether in Cyprus there exist, strictly speaking, any Metrouké pastures, although doubtless there are grazing rights enjoyed by villages *ab antiquo* over Mevat lands.

Having attempted to make clear what are the natures of the commonest forms of land tenure, and leaving aside for the moment those rights which are attached to land but are not tenures, we come to the question of titles to land and how they may be acquired.

No land may be held in complete legal ownership without registration, and this applies not only to Mirié and Mulk land, but to all Mulk property inseparable from land, even isolated trees which carry no land with them. Cyprus has a separate registry of its own with a head office in Nicosia, and branch offices in the administrative districts. The Registrar-General takes rank as the head of a government department. In the books of the Land Registry Office all Mirié and Mulk properties should be registered, but in fact a large number are not, because compulsory registration is difficult in the absence of a minute and accurate survey, and the latter would be a costly undertaking. The unregistered owners, although they escape the payment of office fees, are under a great disadvantage, being unable to mortgage their lands or to protect their rights against trespassers without registration. The registers record, besides the number of each entry, the locality, nature of property, area, boundaries, category of tenure, name of transferor, if any, name of grantee, reason for grant of title, previous registration, if any, price, if any, assessed value, fees paid, office and date of registration.

A country with so scanty a rainfall is almost without hedges and ditches, and stone walls are not in general use. Such boundaries as hill, valley, river, road, and the names of adjacent owners and their predecessors are generally used. It is not always easy to ascertain the boundary of an adjacent owner, the only visible line of demarcation in most cases being that caused by the turning of the plough on either side, and this is liable to vary according to the diligence of the cultivator. With a minute survey and accurate land measurement these difficulties will be minimized.

The grounds on which a registered title of ownership is granted are—original grant from the government, inheritance from a regis-

tered owner, transfer by sale or gift in the Land Registry Office, and, lastly, proof of possession for ten or fifteen years according to the nature of the tenure being Mirié or Mulk.

Original grants of Mirié are given by the government to the first cultivators of unopened land, which becomes Mirié by cultivation, on payment of a fee which is supposed to represent the value of the bare land, or to purchasers from the government of Mirié land which has become vacant by failures of heirs; or on proof of occupation for ten years of Mirié land not previously registered. According to the strict rule a grant would be made to the original cultivator only when the permission of the government has been given before cultivation, but in practice cultivation generally precedes the grant. Original Mulk grants are made on sale by the government of vacant Mulk property on failure of heirs and on the registration of Mulk hitherto unregistered on proof of possession for fifteen years. It has been shown above how claims arise for the registration of Mulk property imposed upon Mirié land.

In the inheritance of Mirié land direct heirs of the same degree take in equal shares, males and females alike, the children of a person, who but for his prior decease would have been an heir, taking their parent's share. On failure of direct heirs, the father and mother succeed, or the surviving parent succeeds. Failing parents we come to the collateral heirs, of which brothers are preferred to sisters, and the consanguineous is preferred to the uterine line, but the descendants of brothers and sisters do not succeed to Mirié land. On failure of brothers or sisters or their representatives, the succession passes to the surviving husband or wife of the deceased owner, and in all cases where there is a failure of direct heirs of the deceased owner and the inheritance passes to other heirs, the surviving spouse takes a quarter share. There are certain restrictions on the right of inheritance—for instance, the land of a murdered owner cannot pass by inheritance to his murderer, nor can the land of a Moslem pass by inheritance to his children, father or mother, non-Moslem, and vice versa.

Succession to Mulk follows the same rules as succession to personal property, and this is now regulated as regards non-Moslems by a law of wills and succession passed since the British occupation. Such succession is more extensive than in the case of Mirié land and when property is mixed, as in the case of a farm in which there are buildings and gardens which are Mulk and land which is Mirié, there may be a failure of heirs to the Mirié and not as to the Mulk. In such case the heirs who succeed to the Mulk have a prior right to a regrant of the Mirié before it is put up for sale to purchasers. On succession, co-heirs may obtain titles for their

undivided shares, or the estate may be partitioned and each heir be registered for his separate share.

No sale of Mirié or Mulk is valid without registration, nor may any but a registered owner convey. An owner who has purported to sell without a registered transfer may repudiate the sale, and if he has parted with possession he may assert his legal right in an action against the purchaser, as may also his heirs, or a purchaser by registered transfer. In the first case, however, the plaintiff will be required to return the purchase money as a condition of obtaining an injunction, but his heirs or registered transferee are under no such obligation. When, however, a contract of sale has been filed in the Land Registry Office, a transfer in accordance with the contract may be enforced in an action for specific performance. Sales may be set aside for illegality, as when the transfer has been obtained by force or by fraud, or when it can be shown that the consideration is a condition of an illegal nature, such as a premium by the transferee to maintain the transferor during his lifetime, which condition would be liable to be defeated by the former dying before the latter. Another case in which a transfer may be set aside is when it appears to have been made by the seller to defeat his creditors and the purchaser is a party to the fraud. A minor may not transfer his land at all without leave of the Court, which is only granted on certain grounds. A sale may also be defeated by the intervention of a third party who has a right of pre-emption. This arises when a Mulk property in a town or village has been sold and an adjacent owner, on becoming aware of the sale, claims to purchase the property himself in a formal manner prescribed by the law. The expenses of sale and registration already incurred must be paid by the claimant in addition to the purchase price agreed between the parties to the sale. A similar right arises in the case of Mirié land when, as sometimes happens, one man has a building or plantation on the Mirié land of another. In such case, if the owner of the Mirié land on which the building or plantation stands alienates it, the owner of the building or plantation may claim the land on paying its bare value. Other cases of the right of pre-emption are that existing in the case of co-owners of Mirié or Mulk *inter se*, and another in favour of the fellow villagers of a seller of Mirié land. If a man sells land in his village to the inhabitant of another village, his fellow villagers who have need of land may claim the land at the agreed sale price.

Possessory titles may be obtained on proof of occupation of Mirié land for ten, or Mulk for fifteen years, provided the original occupation is not admittedly wrongful. In computing time the possession of a deceased occupier and that of his heir or heirs may

be joined. A common case of such grant is when the claimant or his ancestor was a purchaser without a legal transfer in the first instance, but a mere trespasser may vindicate his right to be registered on proving his possession for the required period and resolutely refusing to admit that his original occupation was wrongful. But minority, unsoundness of mind, or absence from Cyprus may prevent the time of prescription running against the lawful owner so long as such disability exists.

In certain cases land granted in private ownership may revert to the State as vacant land. This arises when there is a failure of heirs entitled to succeed. There are, however, certain privileged persons who, on failure of heirs, may claim a regrant on paying the bare value of the land. These are—the owners of buildings or plantations upon the vacant land, joint owners, inhabitants of the same village who have need of land. If the land is not claimed by any of such persons, it will be sold at auction and regranted to the highest bidder. Another case where private ownership may become extinguished is when Mirié land has been left uncultivated for ten years without lawful excuse.

Registration, as has been shown before, is necessary to create a legal title, and a judgment for an injunction or damages will not be granted except to a registered owner. It has, however, been the practice of the Courts to allow an unregistered owner to sue a trespasser who contests his title in the following manner: The plaintiff must ask in the first place a declaration as to his right by succession from a registered owner, or as to his having proved possession of Mulk for fifteen or Mirié land for ten years, so as to establish his right as against the defendant. In the second place he must claim his injunction or damages. The declaration, if obtained, is good only as against the defendant, and the Land Registry Office is not bound to grant the plaintiff a registered title upon it, but if no third party puts in a plausible claim, and there is no other sufficient reason for refusing him a grant, the declaration will be a sufficient ground for giving him a registered title, and on producing the certificate of registration, the Court will give him such relief as he has shown himself entitled to. Regarding actions in trespass it has been noticed in a former passage that no action for damages only arises from the wrongful cultivation of the Mirié land of another. In such cases the form of judgment is an order for the uprooting of the wrongfully sown crop by an officer of the Court. In Ottoman law the crop does not go with the land, and a crop sown in ignorance or contempt of the rights of the landowner may not be appropriated by him, and if he wishes to remove it, he must proceed in a regular manner and obtain its removal in pursu-

ance of a judgment. So if one man wrongfully grafts the wild tree of another, the owner of the tree may obtain an order to have the graft removed, and this is his proper remedy.

Registration once obtained is good against all comers so long as it remains undisturbed, but it is not indefeasible. It may be attacked by counterclaim brought by way of defence to an action in trespass, or by a separate action, either on the ground that the grant was wrongly made owing to mistake, force, or fraud, or on the ground that the claimant in the action or counterclaim has a right of pre-emption or a right to be himself registered on the ground of occupation for the prescribed period, as above explained in reference to registration on the ground of possession.

Akin to the subject of registration of title is that of mortgage and judgment lien, both of which are matters of registration, and furnish a vast amount of business to the Land Registry Office in a country where money-lending is almost the only means of investing capital, and the money-lending class includes lawyers, merchants, clergy, schoolmasters, peasants, and in fact all those who have any savings to invest. Loans are secured by promissory notes and mortgages, often by both. Any registered property can be mortgaged. The registration of a mortgage does not affect the legal title, but establishes a lien, so that the mortgagor cannot sell his property so long as the mortgage remains upon the register, while the mortgagee may, if the debt and interest are not paid within the stipulated time, cause the land to be sold in satisfaction through the instrumentality of the Land Registry Office, without an action. The rate of interest may not exceed twelve per cent. per annum. By registering his judgment in the Land Registry Office a judgment creditor may obtain a lien for the judgment debt on the registered property of his debtor. This lien remains good for two years only, but may be extended for further periods of one year at a time by the Court if there appears to be sufficient ground for so doing. So long as the registration continues in force, the debtor's interest in the land remains charged with the payment of the judgment debt, and notwithstanding any subsequent mortgage or transfer, it may be sold in execution of the judgment. There may be a succession of these registered judgments, each taking priority according to the date of the registration. Land cannot be sold in execution without leave of the Court, and in no case may a debtor's only house be sold under a judgment. There is a procedure by which a judgment creditor may cause to be registered in his debtor's name property unregistered, but for which the debtor has a right to be registered. The creditor has to bear in the first instance the cost of obtaining registration, and he may add this to his original debt when he

comes to sell the property in execution, but he will not be allowed to add this to the general costs of the action so as to be recoverable against other property.

Leases are contracts only, and carry no property in land.

In Cyprus the rent obtainable generally for agricultural land is so low that landowning for the purpose of letting is not profitable. The common practice is for the owner to make a partnership arrangement with a farmer. In a common form of partnership the owner provides the seed in addition to the land, and contributes to the cost of harvesting; the farmer provides the labour, the oxen, and the instruments of husbandry; and the corn is divided between the partners in equal shares. This arrangement is rendered workable by the fact that the government takes its tithe in kind, so that the corn cannot be removed from the threshing-floor till the tithe collector has measured it and taken the tithe. This gives the owner of the land an opportunity to assert his right before the corn is removed, and he can, moreover, ascertain the amount from the tithe receipt, unless the partnership crop has been mixed with other crops. There is no landlord and tenant question in Cyprus. The man behind the plough is generally a landowner or his servant, and is often a richer man than the owner of the field he ploughs.

The owners of houses in villages have in general common rights of some kind, such as rights of pasture over lands enjoyed *ab antiquo*. There are also pastures attached to farms known as chiftliqs, but these are held as Mirié properties. Villages have also common threshing-floors where the inhabitants thresh their cereals, and these may not be cultivated or sold. Private threshing-floors are Mirié property.

Rights of way may arise by way of grant or by immemorial user, or are ways of necessity arising on the sale or partition of property. When a right of way is claimed by way of grant it should appear in the registration of the dominant or servient tenancy.

Rights of water are of the greatest importance. The rivers run dry in summer, and there are few permanent springs of water upon the surface of the land. Nevertheless, much water is drawn from wells, by water-wheels worked by mules, or by air-motors. In many places a permanent supply of water is obtained by connecting a chain of wells descending from a higher to a lower level until the water flows upon the surface. These chains of wells with their aqueducts are Mulk property, and the water belongs to the owners, whether private individuals or quasi corporations, such as municipalities, villages, or religious foundations. A right to share in the use of water so obtained, apart from ownership of the water system, may be acquired by agreement. This is a matter of con-

tract only, but it is often entered on the register with the property in respect of which it is enjoyed. River water is free to all men, but riparian owners may appropriate water by leading channels from a river to their land, provided they do not take so much water as to injure the equal rights of their neighbours. The rights of landowners to share in the use of such appropriated water are often very complicated, and are proved by *ab antiquo* user or by agreement. Sometimes these rights are recorded in the land registers, but want of registration is not a bar to an action in respect of such a right if it can be proved otherwise.

An artificial water channel is a Mulk property, and the use of the water in it belongs to the owner, but the sacred law does not allow an ungenerous exclusiveness in the exercise of a private right to water. So we read in the Mejellé (Art. 1267):—'The right of watering animals and crops from streams which are Mulk property, that is to say, from water which enters into a channel which is Mulk property, belongs to the owner of it. Others have a right of drinking in them. Therefore from a river which is the special property of a number of persons, or from a man's water channel, or his water-pipe, or his well, without permission, another cannot irrigate his land. But he can drink the water, by reason of his having a right of drinking. And if there is no fear of the destruction of the river or water channel, or pipe, by reason of the number of animals, he can bring his animals there and water them. And, moreover, he can get water with a jug, or barrel, and take it to his house or garden.' The word 'river' in the above quotation appears to refer to an artificial canal or channel which is Mulk property.

The most important rights attaching to houses are those of light and privacy. However recently a house may have been built, the owner has a right to prevent the obstruction of light coming to his windows; but the obstruction of light coming to a window does not give rise to a cause of action if sufficient light remains to the owner from unobstructed windows of the same room for the ordinary purposes of occupation. A house-owner has a right to prevent his neighbour from opening a window which will overlook those parts of his house ordinarily used by women, such as living rooms, bedrooms, the kitchen, or the yard where women wash and cook, but this right does not extend so as to protect gardens or stables.

In this brief sketch little distinction is made between that mass of the law which is Ottoman and such additions or modifications as are due to later legislation, yet it may be as well to mention some points in which the latter is particularly noticeable. The law of mortgages has been remodelled, and judgment lien is a new

creation. Useful measures affecting land are the forest laws, the object of which is to preserve the trees and undergrowth on waste land so as to check the gradual denudation of the island, and laws for the storage and distribution of water so as to economize the scanty supply.

Tithes which were formerly levied on almost every kind of produce are now taken only on wheat, barley, oats, and vetches. These are taken in kind upon the threshing-floors. The question of the abolition of tithe comes up from time to time, but has not been solved as yet. A western reformer might regard the right of the government to take tithe on land as a result to be aimed at, not an evil to be got rid of, and if the Cyprus politician were a modern Radical he might be of that opinion. If, on the other hand, it be an advantage to the State that private ownership of land should be as full and unburdened as possible, then the State rights over Mirié land should be minimized and tithe abolished, so soon as some other method of raising money could be agreed upon. There are obvious objections to the taking of tithe in kind, but it would be almost impossible to levy tithe at all if the government lost its control over the threshing-floors. A substantial land tax would be very unpopular as a substitute, especially if it attacked occupiers who now escape tithe because they do not cultivate tithed cereals. It would, moreover, be difficult to assess, and its recovery would involve a constant appeal to the law courts.

THOS. W. HAYCRAFT.

AMENDMENT OF THE LAND TRANSFER ACTS.

IN the January number of this REVIEW (*ante*, p. 26) Mr. Charles Sweet contributes an article entitled 'The Land Transfer Acts.' In the present paper I propose, first, to say something about that article, and then to offer some suggestions, by way of alternative to Mr. Sweet's scheme, for amendment of the existing Land Transfer Acts of 1875 and 1897.

Mr. Sweet's article divides itself into three parts. First of all the 'Observations' of the Law Society are approved, and the existing system of registration of title is condemned. Then the existing system of conveyance by deed is condemned. Lastly, a remedial system of conveyancing and registration is outlined.

With the condemnation of the existing system of conveyance by deed I agree; I also agree with the description of 'our law of real property' as 'a hopeless jumble of inconsistent doctrines.' But I differ from Mr. Sweet with respect to his treatment of the existing system of registration under the Land Transfer Acts, and with respect to his proposed substitute.

No doubt it is gratifying to the Law Society to have their official pronouncements in the 'Observations' described in laudatory terms—as having 'been prepared with great care and ability,' and as being of such high quality that 'it is impossible for any disinterested person to deny their justice.' After giving these 'Observations' a very thorough examination I came to the conclusion that they were not prepared with either 'care' or 'ability,' and certainly could not be called 'just.' These conclusions were published by me in a pamphlet and brought to the notice of the Law Society. Mr. Sweet has evidently not taken the trouble to check the statements of fact in the Law Society's 'Observations.' The general criticism to which the Law Society lays itself open in attacking the system of registration under the Land Transfer Acts is one to which, as I conceive, Mr. Sweet also lays himself open, viz. that while professing to find fault with the whole statutory system set up, it is really one part of the system only which in any way justifies the severe things said of the whole. The Land registry has failed so far to make the system of registration of title as smooth-working and as popular as it ought to be, principally because practitioners have taken advantage of the provisions of the Act of

1875 to insist on registration with possessory title when the Act of 1897 has made registration compulsory. This is really the chief cause of nearly all complaints made against the Land Transfer Acts and the Land registry. Mr. Sweet (perhaps unwittingly) admits this in effect when he speaks (p. 37) of 'the system of registering possessory titles under the Land Transfer Acts' having broken down. The essence of any really useful system of registration of title is that the title which passes by a transaction being recorded in a public register should be *ipso facto* a good title, and should not require extrinsic investigation at the hands of a purchaser. Registration with merely possessory title does not *ipso facto* enable a purchaser to dispense with investigation of his vendor's title prior to the first registration. It is possessory registration that should be condemned, not the whole system of registration of title as it might be carried out even under the existing Land Transfer Acts. No real trial of the advantages of the Acts has yet been made on any adequate scale.

Now, in propounding a scheme in substitution for the present Land Transfer Acts, Mr. Sweet has lost sight of the essential principle on which registration of title is based—the abrogation of investigation of past title. This is evident from the fact that he expressly proposes to assimilate title in land to title in stocks and shares, whilst he erroneously attributes to the mere fact of registration the superiority of the system of transfer of stocks—'the simplicity of title to stock is due entirely to the system of registration' (p. 40). The 'simplicity of title' in the case of stock is really due to the fact that retrospective investigation of title is unnecessary and the registration of a person as holder of stock actually confers on him a good title to that amount of stock. The title to the stock is in effect guaranteed, and it is the existence of this guarantee of title that constitutes the excellence of this system of transfer. The system of registered conveyances of the legal estate, however, proposed by Mr. Sweet is a system of deed registration—not registration of title at all, and therein differs vitally even from the stock transfer on which it is supposed to be based. To do away with any State guarantee of title, as a remedy for the acknowledged difficulty in giving the State's guarantee under the present circumstances of titles to land in England, is to cut the knot instead of untying it.

One other general criticism of Mr. Sweet's scheme is this: In it the subjects of improvement of conveyancing by registration and general reform of the law of real property are considered together, with a view to their being combined and dealt with in a single Act of Parliament. I submit, on the contrary, that greater progress

towards the desired goal will be made if the two subjects are kept distinct. Ideally, the better plan would be to abrogate by statute 'the antiquated doctrines of seisin, tenure, and uses' before proceeding to formulate an improved scheme of conveyancing by registration. Practically, it is useless to postpone the improvement of conveyancing until our real property law is properly overhauled. Let any necessary legislation on the subject of registration be carried out by itself, and leave the principles of real property law to be dealt with separately.

I proceed to indicate what appear to me to be the provisions that could advantageously be embodied in an Act amending the present Land Transfer Acts. A formal Bill, as presented to the legislature, would of course contain a good many machinery clauses which need not be referred to here, but the main provisions of such a Bill should relate to the following:—

1. First registration.
2. Method of keeping the registers.
3. Settlements of registered land.

1. The most important and most difficult problem to be dealt with is how to get land on to the register for the first time. Under the present system areas are created, with the consent of local authorities, within which first registration is compulsory on sale. In order to obtain uniformity throughout England in the matter of transfer of land with no more delay than is really necessary, this consent of local authorities should no longer be required, and areas—which might be called 'registration districts'—should be gradually constituted under successive Orders in Council until all land in the country is situated in some 'registration district.' Registration within every registration district should be made compulsory, but on a different system from that now prevailing. Instead of first registration being merely compulsory on sale, the system of compulsory first registration 'by areas' should be adopted. The Bill should enact that, upon a certain area being constituted a registration district by Order in Council, all land registrable under the existing Acts and situate within the limits of the registration district should be deemed to be registered land, and should be as far as possible treated as land that had been placed upon the register for the district. The result would be somewhat analogous to that produced under the existing system in London if all registrable land were actually registered with a possessory title. All land within the district, other than land (such as copyholds, &c.) that could not be registered at all, would then have to be transferred, mortgaged, leased, &c., in accordance with the provisions of the Land Transfer Acts. But this plan of bringing on

to a register whole parishes *en bloc*, without any previous investigation of title or inquiring into prima facie title, necessarily implies that the registers shall be of a type somewhat different from that now in operation in London. It is the form of the register, and the manner of effecting registration of transactions, that constitute the principal difference between the registration now in vogue in London and the system I propose.

2. The method of keeping the registers to be set up by the Bill will differ from the method now in use in London in two main features. In the first place, the present system of according a State guarantee of title with respect to all land on the register (even land registered with possessory title being now the subject of a qualified guarantee as from the date of first registration) should be abrogated; in the next place, every registry should contain two registers, on one of which will be placed all land whose title is guaranteed by the State, and on the other all land whose title is not guaranteed. The two registers proposed will be called, respectively, the Provisional register and the Permanent register. When all the registrable land in a registration district comes automatically on to the register, it will be the Provisional register on which the land is thus placed. Land on the Provisional register will not be the subject of any State guarantee of title whatever. Land to which a guaranteed title is required must be transferred from the Provisional to the Permanent register, and the title conferred in respect of land placed on the Permanent register will be in the nature of the absolute title under the existing Acts. The title to any land proposed to be placed on the Permanent register will have to be approved by the registrar, and of course investigated, if necessary, in the usual way. After land has been for some prescribed time (such as six or ten years) on the Provisional register, the registrar will have power to transfer it to the Permanent register of his own motion and without any formal request from the owner. Thus the Permanent register will be as nearly as possible the same thing as the present London register would be if only absolute titles were registered. The Provisional registers will differ very considerably from the present London register and from the new Permanent registers.

The Provisional registers are intended merely to facilitate the ultimate placing of all land on the Permanent registers, and in the meantime to secure such of the advantages of registration as can be secured without State guarantee of title. In form, the foliums, pages, or constituent parts of a Provisional register may be made up as a Permanent register is made up; but it will be essential that no official certificates or copies of the entries in a Provisional register

be issued. The registers, in fact, will only be kept in the same way as the Permanent register is kept for the sake of conveniently summarizing the state of a title, and not in order to accord to the statements made any official sanction. The 'register' itself, indeed, will not be the most valuable part of the Provisional register machinery. The most important difference between Provisional and Permanent registers will consist in this: whilst the statements made in a Permanent register of title are the vital part of the system, and the documents filed (but not directly forming part of the register) are merely of subsidiary importance, in the case of a Provisional register it will be the filed documents themselves that form the really valuable part of the whole registering apparatus, the statements in the register of title having no special efficacy imparted to them by statute. No State guarantee of title being accorded to landowners whose land is on a Provisional register only, the strength of their title will necessarily depend on the validity of the actual documents that constitute steps in the title, just as at present in the case of unregistered land. Investigation of title will have to be undertaken with respect to land on a Provisional register precisely as it is undertaken in the case of unregistered land. Hence the actual file of executed documents is all-important, and the register of title a secondary matter, in the case of a Provisional register. The file of documents will, in fact, become a sort of Deeds registry, and it will be necessary that the registered documents should be treated as in a Deeds registry, and be open to the public for search and investigation. Of course, as in the case of other Deeds registries, only copies or duplicates of the actual conveyances, mortgages, &c., need be filed. The necessity for registering a document (conveyance, mortgage, &c.) will, however, do a great deal towards clearing titles and simplifying their investigation. Registration, in the case of land on a Provisional register, will be just as essential to the validity and complete operation of a document as in the case of land on a Permanent register. In the one case the document will have operation by virtue of its own intrinsic efficacy plus registration; in the other case the statement in the register only will have any efficacy in conferring title. It seems probable that landowners will, after their land has been for some time on a Provisional register, voluntarily take steps to have it transferred to the Permanent register, in view of the additional advantages afforded by the State guarantee of title.

3. One evil of Deeds registries is the enormous accumulation of records that have to be searched through, when investigation of prior title is not abrogated. Settlements, in particular, are respon-

sible for a considerable increase in the number of documents of title brought into existence. By inducing settlors to adopt the personalty, rather than the strict, form of settlement, and thus vest the entire legal ownership of the settled property in trustees, a good deal can be done towards reducing the number of documents that need appear on a title and that need be registered.

The suggested Bill should contain two sets of provisions upon this subject. It should be provided that no one can, by registering any document, have vested in himself any legal estate less than a fee simple or term of years varying from twenty-one to ninety-nine, and the creation of long terms of years (say more than 100 years) should also be forbidden. Other interests, for life, &c., should be of the nature of charges, and not estates in the nature of ownership of the land. In particular, it would be a great advantage to abrogate estates tail for the future. Subsidiary interests in land, as the interests of beneficiaries under a settlement, would then not require registration any more than in the case of a stock settlement, unless for the protection of persons dealing with the owners of the subsidiary interests.

For the protection of persons dealing with owners of interests in land less than the fee simple or a whole term of years, the following plan might be adopted, having the collateral advantage of relieving the public registers of much unnecessary weight. Let all interests in land less than the fee simple or a term of years be regarded as in the nature of personalty and subject to the rule in *Dearle* v. *Hall*, so that priority between conflicting assurances as incumbrances would go according to the time of giving notice to the trustees of the fee simple, &c., and not according to the time of the instrument being executed. Notice of an assurance or incumbrance would then have to be given to the trustees as a matter of course. Let it further be made part of the duty of every set of trustees to keep a record of all notices of this kind received by them. This record could be kept in the form of a few additional sheets of paper at the end of the settlement, and a proper receipt for the notice could be obtained by the incumbrancer. When the settlement came to an end, the record of course would be closed with it, and much unnecessary ephemeral matter would thus be kept off the public registers.

I have shortly indicated what appears to be a workable scheme for amending the Land Transfer Acts. Although it seemed best to describe the outline of the scheme in general terms rather than enumerate clause by clause of a formal Bill, I have nevertheless worked the scheme out in detail to some extent by drafting a Bill in proper form and with necessary machinery clauses. This draft

Bill comprises only twenty-two clauses and two schedules, so that the scheme cannot be called inordinately long or complex. Moreover in this draft are included, besides purely machinery clauses, provisions for improving the existing Acts on the subject of the legal estate, mortgages, &c., the necessity for which is generally admitted, and need not be enlarged upon here.

JAMES EDWARD HOGG.

THE RIGHTS OF SECOND MORTGAGEES REGARDING POSSESSION.

THE generally recognized disadvantages of a second mortgage are, chiefly, (1) the risk, consequent upon the legal estate being outstanding in the first mortgagee, of a subsequent incumbrancer acquiring the first mortgage and tacking his security; (2) the existence of an undisclosed equity prior in date to the second mortgage; and, of course, (3) the possibility of the first mortgagee realizing his security at a sum only sufficient to satisfy his own needs.

Of these the latter is not the least, but a second mortgagee is apt commonly to consider that, should the risk of such a sale become imminent, he may be able to avert it—as he frequently does—by taking possession of the property and paying the first mortgagee his interest regularly, keeping down the outgoings, and out of the remaining rents and profits of the land executing the necessary repairs and making good the depreciation the security may have suffered. This course of action, more often than not, perhaps, is likely to satisfy the needs of the situation, and it is probably more resorted to in practice than the alternative of appointing a receiver under the Conveyancing Act, 1881, s. 19, because the powers of a statutory receiver are very limited, and because he has no power of leasing, and for other reasons. To take possession being, then, usually the first and best resort of a 'puisne' mortgagee threatened with disaster, it is a matter for some surprise that an incumbrancer not having the legal estate cannot as such recover possession of the land at all by any process short of foreclosure or redemption (except possibly in the case of a registered charge under the Land Transfer Acts).

So entirely is this the case that even a first charge gives no right to the holder who happens to be without the legal estate to enter into possession either against the mortgagor or against a stranger wrongfully in possession, and such an incumbrancer is, equally with a second or subsequent mortgagee, unable to maintain an action for the recovery of land.

This does not mean that if an incumbrancer having no legal estate actually takes possession he cannot maintain it once acquired. He can, of course, in fact do so—as any other usurper can—against all the world save the owner of the legal estate, and, for instance, he can bring an action to restrain trespass or entry (which is not an 'action for the recovery of land'), *Spear's, &c., Ltd.* v. *Spear*,

37 L. J. N. C. 578. But it does mean that, unless he finds the land vacant (as would occur in the occasional, though not very common, case of a mortgagor in possession absconding) he cannot turn out any *de facto* possessor whatever, and this although the first mortgagee is willing to acquiesce in his taking possession.

It would, at first sight, seem that, since the Judicature Acts, at any rate, a person having the first equitable right to the land, or to the legal estate, or the first right in equity to possession, should be able to recover it against a person having an inferior right, or no colour of right at all. For, though the old action of ejectment, as a common law action, might well have been only enforceable by the person having the legal estate (and the modern 'action for the recovery of land' is but the action of ejectment under a new name), it might be thought that the technical limitation of this *legis actio* would, through the fusion of law and equity, be of no practical consequence[1]. The principles of the Courts in enforcing equities furnish, however, the reason for the contrary, and an apt illustration occurs in the case of *Allen* v. *Woods*, 68 L. T. 143 (1893), in the Court of Appeal. In that case, the plaintiff, as mortgagee of certain land in the possession of the defendant (under what title, if any, it will be noted, is not stated in the report, as being immaterial), had sought to recover possession upon an equitable title, the legal estate being admittedly outstanding in a person not a party to the suit, and he had failed in the Court below. The judgment of Lindley L.J. was as follows (Lord Esher and A. L. Smith L.J., the other members of the Court, concurred in dismissing the appeal):—

'This is an ingenious attempt on the part of the plaintiff to rely upon an equitable title in an action of ejectment without having regard to the principles upon which equity acts. The plaintiff has not brought before the Court the person in whom the legal estate is vested. Such a proceeding as that has never been heard of in a court of equity, and such an action could not proceed unless an amendment were allowed making such person a party. The question as to the equitable title cannot be decided without bringing all the proper parties before the Court. For a plaintiff to come into court and say that he is a *cestui que trust* and to claim possession of the property in respect of which he is the *cestui que trust* without bringing all the parties before the Court is a proceeding which cannot be maintained. This action has been entirely misconceived, and the appeal must be dismissed.'

[1] Lord Cairns in fact stated before the Select Committee on Land Titles and Transfer in 1879 (Vol. 1878-9, p. 148, No. 2872) that 'the Judicature Act knocked on the head, for all practical purposes, the distinction between the equitable and the legal estate, and a man with an equitable estate was practically as well off as a man with a legal estate.' Had such an intention been successfully carried out by the Act, a different means of enforcing compulsory legislation under the Land Transfer Act would now be needed.

It is of no avail that the mortgage may be in form a legal one—unless, possibly, the mortgagor has concealed the prior mortgage, so that it may be said to operate, so far as he is concerned, as a legal mortgage by estoppel—seeing that it is but executory in fact, and therefore 'equitable' in the broader sense of the term (not the special sense of a charge by deposit of title deeds).

Little difficulty may arise in the case of a mortgagor in possession abandoning the property to its fate, seeing that the incumbrancer who, with the acquiescence of the owner of the legal estate, thereupon assumes possession, can, like any one else, maintain such possession against third parties, though even here special precautions may be necessary, e. g. to maintain effective *de facto* possession of any unoccupied premises on a mortgaged building estate. But in the more usual case of a mortgagor unwilling to give up his possession, it follows from what has been said above that he can only be ejected with the assistance of the first mortgagee as owner of the legal estate—who may well be a 'sleeping dog' prudently to be left undisturbed, and the incumbrancers on the equity of redemption are thus powerless to step in and avert disaster by 'nursing' their security or to rescue the property from the tender mercies of an insolvent proprietor. And it is conceived that it also follows, where the property is wholly occupied by tenants, that the usual notice by a mortgagee to pay their rents to him would, if given by a second mortgagee, be ineffectual against the mortgagor who had granted their leases, and equally so any attornment to or recognition of the second mortgagee by such tenants.

The mortgagor himself is, however, by the Judicature Act, 1873, s. 25 (5), placed in an exceptional position as regards the general rule against recovery of land by a person not having the legal estate. This section enacts, in effect, that a mortgagor may (in the circumstances there stated) sue for possession against persons other than his mortgagee. It does not seem ever to have been suggested that the word 'mortgagor,' as used in the section, might be held to cover assignees of or incumbrancers upon the equity of redemption.

And in regard to a second mortgagee by demise, the difficulty would seem not to occur. The position of a lessee out of possession is somewhat similar to that of a freeholder having the legal estate, inasmuch as such a lessee can maintain ejectment, and this even if he has never entered under his lease; for his estate in the term, technically an *interesse termini*, is, in such a case, a quasi-legal estate carrying the right to possession and to maintain the action of ejectment. It follows that, in many cases, the creation of a long term would be of more advantage to a second mortgagee than the usual executory mortgage in 'legal' form, and there is no reason

why such a term should not be created at least as an additional security during the existence of the prior mortgage. In such a case, the position of a mortgagee under it would be that of trustees of portion terms, where there is a prior mortgage on the settled land.

In our day, the numbers of persons in the position of subsequent incumbrancers and the aggregate amount of such securities must be very considerable, and it is submitted that the ordinary form of mortgage which is generally relied on, whether a prior mortgage exists or not, is insufficient where a prior mortgage does exist, or where the legal estate is otherwise outstanding, as it confers no possessory rights, and that the matter is one which requires the reconsideration of conveyancers, who would seem to have given altogether too little attention to second mortgages.

At any rate the disability here discussed should form a recognized item in the list of disadvantages customarily put forward as attending these securities. The point is certainly not within that category at present, and is, perhaps, one of the instances of over-reliance upon modern statutory changes, without regarding the foundations of our law, which occasionally occur to remind us that we are not yet independent, even in everyday practice, of legal history.

And the matter may be worth legislative attention, in view of the slight change needed to secure to incumbrancers generally the right to possession which (as mentioned above) has already been expressly conferred upon mortgagors by statute, and possibly also upon proprietors of registered charges on land registered under the Land Transfer Acts. The Conveyancing Bill now before Parliament presents an opportunity.

Perhaps a provision (for what it is worth) might usefully be inserted in second or subsequent mortgages expressly authorizing the mortgagee to take possession against the mortgagor, who also, so far as is practicable, might delegate his rights under the above-mentioned section of the Judicature Act to the mortgagee. And, seeing that the summary remedy for recovery of land under Order III, rule 6, has been held to be available to a mortgagee between whom and the mortgagor the deed has created the relationship of landlord and tenant (*Daubuz and Others* v. *Lavington*, L. R. 13 Q. B. D. 347), it should again become a matter of common form conveyancing to insert in these mortgages, for the purpose of giving a right to take possession, the attornment clause which, before the Bills of Sale Acts, used to be inserted for the sake of giving a power of distress.

R. M. P. Willoughby.

A MODERN DIALOGUE BETWEEN DOCTOR AND STUDENT ON THE DISTINCTION BETWEEN VESTED AND CONTINGENT REMAINDERS.

IN a former article[1] it was suggested that so far as the distinction between vested and contingent remainders was associated with remainders which were valid or indestructible by a rule of law defeating intent, and those that were only conditionally valid or destructible by such a rule, some remainders might be classed with those that were 'vested,' although they were subject to a condition precedent in form and in fact to their ever taking effect in possession. Two critics, at least, have refused utterly to accept such a view, and have decried any attempt to associate with so-called vested remainders any remainders which were in fact and in form subject to a condition precedent to their ever taking effect in possession[2]. On the contrary, they have insisted that such interests be called 'contingent remainders.'

Their words have set me to considering the matter from a somewhat different point of view. Are we talking about essentials when we discuss a distinction between vested and contingent remainders? Are we not rather concealing our real meaning—obtaining results upon a rational basis which is never mentioned, then stating those results in irrational terms of 'vested' and 'contingent,' then building up an artificial notion of what remainders are vested and what contingent, and finally beginning to refer our results to this artificial distinction as its cause? Have we not, in short, come to the point of wasting time in an esoteric hypothesis which has no proper relation to any pragmatic results?

I believe these questions must be answered in the affirmative.

The following dialogue between a modern doctor and student is, I think, a not unsuitable way of maintaining my thesis. It is perhaps unnecessary to say that the doctor is fed, as far as they seemed in any degree digestible, with the ideas of my critics, or with facts which they might fairly be expected to admit:—

S. Remainders, as I understand them, embrace all legal future interests in land which are bound to take effect, if at all, after a

[1] Future Interests in Land, II, L. Q. R. xxii. 383.

[2] Harv. Law Rev., Jan., 1907, p. 243; Mich. Law Rev., vol. v, p. 497, Article by Joseph W. Bingham.

particular estate of freehold by way of succession—that is, whenever and however the preceding estate may determine otherwise than by being prematurely cut short by the express provision of the settlor.

D. Your definition is exact and comprehensive. I would only like to see it made a little shorter.

S. I understand also that a legal interest limited to take effect in possession after a term for years is not a remainder at all.

D. You are quite right. If it is contingent it is a springing executory interest[1]. If it is non-contingent it is supported as a present interest subject to a term for years. The holder has a present seisin[2], while the remainderman or holder of a future interest limited after a freehold has none. That a freeholder after the term has actual seisin is clear from the fact that the spouse of the freeholder after the term has dower or courtesy[3]. The freeholder, even though not the original purchaser, constitutes a new stock of descent[4]. It is clear that the remainderman has no seisin at all because he did not render feudal service[5]. He could not bring a writ of right[6]. In order to transfer a remainder the co-operation by attornment of the tenant was necessary, so that the actual seisin of the freehold in possession might be held for the grantee of the remainderman[7]. A remainderman other than one who was an original purchaser did not constitute a new stock of descent[8]. The consequences arising from the fact that the remainderman had no seisin have come down to us in the rule that there can be no dower or courtesy in a remainder[9].

S. What you say interests me exceedingly, for now I see that you cannot make a distinction between remainders upon the ground that of some the remainderman had actual seisin and of others he had none. The fact appears to be from what you say that all remaindermen alike were without any actual seisin till their interest came into possession.

D. That is precisely the case. As Hargrave says[10]: The seisin

[1] Gray's Rule against Perpetuities, 2nd ed., §§ 59, 60.
[2] Challis, Real Property, 2nd ed., pp. 70, 89, 90.
[3] Scribner on Dower, 2nd ed., p. 233.
[4] *Bushby* v. *Dixon*, 3 B. & C. 298 (4 Gray's Cases on Property, 10).
[5] Pollock and Maitland, H. E. L. ii. 39.
[6] Littleton, s. 481.
[7] Mystery of Seisin, by F. W. Maitland, L. Q. R. ii. 481, 490–93.
[8] Kent. Com. 387. In this respect also the remainder was on the footing of a mere right of entry by one disseised. (The Mystery of Seisin, by F. W. Maitland, L. Q. R. ii. 471, 485.)
[9] Co. Lit. 29 a, 32 a; Scribner on Dower, 2nd ed., 233, 321. In this respect the remainder was on the footing of a mere right of entry by one disseised. Mystery of Seisin, L. Q. R. ii. 481, 485 et seq.
[10] Co. Lit., Hargrave's note, 217.

of those in remainder or reversion is of merely an 'expectant nature' as distinguished from the 'actual seisin' of the tenant in possession [1].

S. It seems to me also that there can be no distinction between different kinds of remainders, on the ground that some are regarded as having a corpus or existence and others are regarded as having none. From a present-day point of view all remainders are mere abstractions—mere rights. From the feudal point of view this must have been true also, since the feudal law attached the attribute of corporeality to that of which one had actual seisin. If, as you say, no remainderman had any seisin at all, all alike held mere abstractions or mere rights.

D. That is beginning to cut into what the books tell us, for it has often been said that a vested remainder was regarded as something and a contingent remainder as nothing at all until it vested. If you are going to abandon this idea, what line of distinction do you propose between vested and contingent remainders?

S. Before I try to answer that let me ask you a question. What is the use of knowing whether a remainder is vested or contingent?

D. Because certain important results depend upon that fact.

S. For instance?

D. A vested remainder is not destructible. A contingent remainder is.

S. What do you mean by that?

D. Why this, that a remainder which is vested takes effect as limited, and a remainder which is contingent must fail contrary to the intent of the settlor if the event upon which it is limited does not happen before or at the time of the termination of the preceding estate of freehold.

S. That sounds very curious and very senseless. Why should there be any such rule?

D. Well, the reason is a feudal one. Originally no future interests limited to take effect after a freehold, which might by any chance take effect as limited after the preceding estate had terminated, were valid. The reason for this was the danger that before they took effect there might be a gap in the actual seisin or possession of the estate. About 1430 it was perceived that if such future interests did not take effect without any gap by the happening of the condition precedent upon which they were limited prior to or at the time of the termination of the preceding interest, there was no objection to their validity. Accordingly it was held that if

[1] 'On the other hand, we cannot find that any sort or kind of seisin was as yet attributed to the remainderman. He was not seised of the land in demesne, and he was not, like the reversioner, seised of it in service, for no service was due to him.' (Pollock and Maitland, H. E. L., ii. 39.)

such future interests did so stand ready to take effect before or at the time of the termination of the preceding interest, they were valid and unobjectionable. They were void or apt to be destroyed if by the happening of the event upon which they were limited after the termination of the preceding interest the gap, of which there was danger, actually occurred.

S. Then all remainders which are to take effect as limited upon a contingency which may happen before or at the time of or after the termination of the preceding estate are destructible by a rule of law which actually defeats the intention of the settlor.

D. Yes.

S. And all remainders which are to take effect as limited upon an event which according to the expressed intent of the settlor must happen, if at all, before or at the time of the termination, whenever and in whatever manner, of the preceding interest, cannot be said to be destructible by a rule of law defeating intent.

D. That is so.

S. Then we have remainders divided into those which are not destructible by a rule of law defeating intent and those that are. Do you call the former vested and the latter contingent?

D. I suppose so. That is the proposition which I started with.

S. You would say, then, that where the limitations are to *A* for life, remainder to the heir of *B*, the interest of the heir of *B* is destructible by a rule of law defeating intent—that is, he cannot take unless by *B*'s death before the termination of *A*'s life estate *B*'s heir is determined. Hence he has a contingent remainder.

D. That is correct.

S. So, if the limitations be to *A* for life and then to *B* and his heirs, *B*'s fee is construed as ready to take effect in possession whenever and however *A*'s life estate comes to an end, and hence it is sure to take effect in possession without any gap. Therefore it is not destructible at all, much less by any rule of law defeating intent.

D. Precisely.

S. What then do you do with the case where the remainder is not certain ever to take effect in possession because it is in fact subject to a condition precedent, but which, if it does, is bound by the express declaration of the settlor to take effect without any gap?

D. For instance?

S. Suppose a gift to *A* for life, remainder to *B* and his heirs, but if *B* dies before the termination of the particular estate, then to *C* and his heirs[1]. What do you call *B*'s remainder?

[1] Gray's Rule against Perpetuities, 2nd ed., § 104.

D. According to the common law view it is clearly vested [1].

S. It is subject to a condition in fact that *B* must survive the termination of *A*'s life estate.

D. That is true [2].

S. Is it not also true that *B*'s remainder is sure to take effect in possession, if at all, by the express provision of the settlor by way of succession—that is, without any possibility of a gap; is it not destructible or liable to fail, if at all, by the express provision of the settlor and not by a rule of law defeating intent?

D. Yes.

S. Then is it vested because though in fact subject to a condition precedent, it is not destructible by a rule of law defeating intent?

D. It has not usually been thought so. It has been said that the interest is vested because the condition is expressed as subsequent in form [3].

S. What difference does that make?

D. If the condition is expressed as subsequent in form, the remainder can be regarded as in existence. If the condition is precedent in form, the remainder cannot possibly be thought of as in existence.

S. But I thought our question was not whether the remainder was something or nothing, but whether it was or was not destructible by a rule of law defeating intent.

D. That is true.

S. Does that have anything to do with whether the remainder is something or nothing?

D. Apparently not.

S. Then why inject that into our discussion?

D. I do not know precisely.

S. Is it not true that the fact that *B*'s remainder is expressly defeated unless *B* survives the termination of *A*'s life estate causes *B*'s remainder to be indestructible by a rule of law defeating intent?

D. Yes.

S. Is there any objection then to calling the remainder vested on that ground?

D. I see none.

S. Suppose now, that the limitations are to *A* for life, and if *B* overlive *A*, then to *B* for life, or to *A* for life with power to appoint, and in default of appointment to *B* and his heirs, or to *A* for life and after the termination of the preceding estate by forfeiture or otherwise in the lifetime of the tenant, to the use of trustees and their heirs during the life of such tenant in trust for him and to

[1] Gray's Rule against Perpetuities, 2nd ed., § 108.
[2] Ibid., § 104. [3] Ibid., § 108.

preserve contingent remainders. Do you call the remainders in each of these cases to *B* vested or contingent?

D. Clearly the authorities say I must call them vested[1].

S. Yet they are subject to a condition expressed as precedent in fact and in form.

D. Yes, that is so.

S. Are they destructible by a rule of law defeating intent?

D. I suppose not. In each case as you say, by the express intent of the testator or settlor the remainder, if it takes effect at all, is bound to do so by succession. That is most clearly so in the case of remainders to trustees to preserve contingent remainders. There it is provided in terms that no matter how the preceding estate determines the remainder to the trustees shall take effect in possession. In the case of a remainder in default of appointment and the gift to *B* if he overlive *A*, the construction given to the language is that the remainder shall come into possession when the preceding estate shall determine, so that there is no possibility of a gap.

S. Do you know of any instance where a remainder subject to a condition precedent in fact or in form, but which is not destructible by a rule of law defeating intent, is said to be not vested?

D. No.

S. Must you not say, then, that the test of whether the remainder is vested is whether it is not destructible by a rule of law defeating intent?

D. Thus far it would seem so.

S. Would not that confine contingent remainders to those limited on a contingency, which by a possibility might not happen until after the termination of the preceding interest, while vested remainders would include all those which were limited on a condition which was expressly required to occur, if at all, before or at the time of the termination of the preceding interest?

D. It would appear so.

S. Suppose then, that after a life estate to *A*, a remainder was limited to the heir of *B* provided *B* died before or at the time of the termination, whenever and in whatever manner, of *A*'s life estate[2]. The remainder to the heir of *B* will not fail because of any rule of law defeating intent. Is not that so?

D. Yes.

[1] *Webb* v. *Hearing*, Cro. Jac. 415 (5 Gray's Cases on Property, 47); *Doe d. Willis* v. *Martin*, 4 T. R. 39, 2 R. R. 324 (5 Gray's Cases on Property, 62); Challis, Real Property, 2nd ed., p. 131.

[2] [With submission, the proviso seems to add nothing. For if *B* is alive when *A*'s life estate determines, the remainder so limited must fail in any case, because there is not any heir of *B*. *Ideo quaere.*—F. P.]

With power of alienation
(in own terms

S. Will you not then have to call it vested?

D. I suppose I ought to, but it is impossible. It will run counter to the usage of centuries.

S. Is that quite true?

D. I supposed it was incontrovertible.

S. The authorities have called remainders subject to a condition precedent in fact and in form vested when by express language they were bound to take effect by way of succession. You can't deny that?

D. No.

S. They have never called such interests contingent.

D. I know of no such instance.

S. They have called them vested because there was no possibility of a gap.

D. Yes. Indeed, Mr. Challis[1] supports the holding that the remainder to trustees to preserve contingent remainders is vested by amending Fearne's language describing the first class of contingent remainders so as to demand the possibility of a gap between the preceding estate and the interest in remainder, in order that the remainder may be regarded as contingent.

S. And does not Butler say that 'all contingent remainders appear to be so far reducible under one head, that they depend for their vesting upon the happening of an event, which, by possibility, may not happen during the continuance of the preceding estate, or at the instant of its determination?'[2]

D. Yes, and I remember also that Professor Gray, in his Rule against Perpetuities[3], declares on the authority of Hawkins[4] that the word 'vested' had originally no reference to the absence of contingency.

S. Then the Real Property Commissioners have in the Contingent Remainders Act of 1845[5] used the term 'contingent remainder' as including only those remainders which are destructible by a rule of law defeating intent—that is to say, those that are limited upon an event which may happen before or at the time of or after the termination of the particular estate.

D. How is that?

S. The Contingent Remainders Act of 1845 reads: 'A contingent remainder . . . shall be capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner in all respects as if

[1] Real Property, 2nd ed., pp. 133-5.
[2] Fearne, C. R. 9, Butler's note g; Challis, Real Property, 2nd ed., pp. 114-15.
[3] 2nd ed., § 100.
[4] Hawkins on Wills, p. 221.
[5] 8 & 9 Vic., c. 106, § 8.

such determination had not happened.' If the expression 'contingent remainder' includes remainders which are subject to a condition precedent which must happen according to the express intent of the settlor before or at the time of the termination of the preceding estate, then this Act will defeat the settlor's express intent by making such remainders indestructible where the event upon which they are limited fails to happen before the preceding estate terminates by 'forfeiture, surrender, or merger.' That, of course, is a *reductio ad absurdum* in the construction of the statute. 'Contingent remainder,' as used in the Act, obviously includes only those remainders which are, by the express intent of the settlor, limited to take effect in possession upon an event which may happen either at the time of or *after* the termination of the preceding interest. To those interests only have the Real Property Commissioners applied the term 'contingent remainders.'

D. I find it hard to answer you, but if you are right concerning the use of 'vested,' then, where the limitations are to *A* for life, remainder to the unborn son of *B*, provided he is born before the termination, whenever and in whatever manner, of *A*'s life estate, *B*'s son who is unborn will take a vested remainder. This is too much of a strain upon usage. 'Vested remainder,' as the words have been used, is too much opposed to the remainder limited to an unborn person to allow of any such application. The point is not susceptible to reason. It is an arbitrary matter of usage. Challis, Butler, and the Real Property Commissioners would never have said that the remainder to the unborn son of *B* in the case put was a vested remainder.

S. Then you absolutely refuse to concede that vested remainders are equivalent to remainders indestructible by a rule of law defeating intent, and that contingent remainders are equivalent to remainders liable to be destroyed by a rule of law defeating intent?

D. I must indeed.

S. What other case do you think of where the distinction between vested and contingent remainders seems to become important?

D. Where the question is whether the remainder is alienable or not by a deed without covenants.

S. You mean that if the remainder is vested it may be so conveyed and if contingent it cannot?

D. Exactly.

S. This seems curious. Are not to-day both sorts of interests generally alienable in the same way?

D. That is by statute.

S. Then there is no rational objection to both being alienable?

D. I suppose not.

S. The reason for the older distinction was again historical I suppose?

D. Well, it was said that the contingent remainder did not exist till it vested. Till then it was nothing at all, and therefore inalienable.

S. That is strange. This saying that a remainder was alienable because it was something and inalienable because it was nothing, was not referable to the fact that of some remainders there was actual seisin and of others not, for of all remainders alike, as you have said, there was no actual seisin.

D. That is so.

S. Then why were some remainders something and others nothing? Both are mere rights—intangible idealities. One may be sure to come into possession and the other may not, but as they stand divorced from actual possession, is it any more difficult to conceive of one as something than the other? Now that all remainders have become fully alienable do we not most naturally speak of all remainders as something that can be dealt with as property? Some are of more value than others, doubtless depending upon the certainty of their enjoyment in possession, but surely one is no less property than the other.

D. The view certainly has been advanced that when it came to be said that the contingent remainder did not exist or was nothing unless the event upon which it was limited happened, it was meant merely that the remainder was void till it vested.

S. Is not that the fact? Did you not say that prior to 1430 remainders limited upon a condition which might happen before or at the time of or after the termination of the particular estate, so that there might be a gap in the seisin, were wholly void? You said also that after 1430 they were still regarded as void, but that upon the happening of the event before or at the time of the termination of the preceding estate the chance for a gap ended and the future interest was regarded as valid. It seems to me extremely reasonable to suppose that after 1430, when remainders were said to be nothing until they vested, what was really meant was that they were regarded as wholly void until the event upon which they were limited happened prior to or at the time of the termination of the preceding interest.

D. No doubt such a view is plausible, and I am reminded of what Williams says[1], that when contingent remainders were first recognized as valid at all it was said that at the time of the grant

[1] Real Property, 17th ed., p. 412.

the remainder was in 'a manner void.' But you forget that the idea that the conveyance of contingent interests was champertous had something to do with making them inalienable.

S. From what you have already said about contingent interests being fully alienable to-day, I take it this reason for holding contingent future interests alienable has long since disappeared, so that you are now able to call some remainders alienable which are actually contingent—as, for instance, where the limitations are to *A* for life, remainder to *B* and his heirs, but if *B* dies before the termination of the particular estate, then to *C* and his heirs. Here you say that *B*'s remainder is alienable[1], but at the same time it is clearly subject to a condition precedent to its ever taking effect in possession.

D. That is true.

S. Then can we not say that in the absence of some actual decision to the contrary depending upon the application of public policy against champertous transactions, the distinction between what remainders are alienable *inter vivos* and what are not is the same distinction exactly as that between those future interests which before 1430 were regarded as valid as limited and those which before 1430 were regarded as wholly void, and were recognized as valid after 1430 only provided the contingency upon which they were limited happened before or at the time of the termination of the particular estate?

D. I suppose so.

S. That is the same inquiry as to whether the remainder is indestructible by a rule of law defeating intent, and whether it is so destructible.

D. Yes.

S. You would have to say then that the remainder to trustees to preserve contingent remainders, in spite of the fact that it is subject to a condition precedent to its ever taking effect in possession, which is expressed as precedent in form, is alienable.

D. Yes.

S. In the same way where the limitations are to *A* for life, and if *B* overlive *A*, then to *B* for life, *B*'s remainder would be alienable, and if the limitations were to *A* for life with power to appoint, and in default of appointment to *B* and his heirs, *B*'s remainder would be alienable.

D. Yes.

S. Would you not have to say then, that remainders to trustees

[1] *Blanchard* v. *Blanchard*, 1 Allen (Mass.), 223 (5 Gray's Cases on Property, 85).

to preserve contingent remainders and the remainders to *B* for life, and to *B* and his heirs in the two cases put, were valid before 1430?

D. Why?

S. Because by the feudal law future interests were valid unless there was a feudal reason for defeating the intention of the settlor. Such a feudal reason existed to defeat the interests, if as limited they were bound to take effect after a gap or by way of lapping over the preceding interest, and also if there was a chance that there might be a gap. In the case of trustees to preserve contingent remainders there is no lap and no chance of a gap. Is there, then, any feudal reason against its validity?

D. There seems to be none.

S. The same is true, is it not, of the remainder to *B* for life where the limitations are to *A* for life, and then if *B* overlive *A*, to *B* for life, and of the remainder to *B* and his heirs where the limitations are to *A* for life with power to appoint, and in default of appointment to *B* and his heirs?

D. It would seem so.

S. Suppose, then, the limitations are to *A* for life, and then if *B* survive the termination of *A*'s life estate, whenever and however that may occur, to *B* and his heirs. Is not *B*'s interest alienable?

D. I should say not.

S. Would it not have been valid prior to 1430?

D. How do I know?

S. Do you know that it would not have been valid?

D. I do not.

S. Do you know any reason against its validity?

D. I cannot say that I do.

S. Is it not reasonable to suppose that when the law in its endeavour to support expressed intent as often as was consistent with feudal policy allowed certain contingent future interests, provided they took effect in possession without a gap, that it would have allowed a remainder expressly limited so that it must have taken effect, if at all, without a gap?

D. I cannot say that it is unreasonable to so suppose.

S. Why, then, do you say that such an interest is inalienable by the common law?

D. Because it cannot be vested, and the rule is that remainders not vested are inalienable.

S. But is not that a childish application of words without reference to their meaning? Is it not deciding the issue contrary to reason and then producing the decision as the reason for the

result? Is it not setting yourself up as the judge and then quoting yourself as the authority?

D. I see no answer to what you say.

S. I take it, then, that you do not see any valid reason for saying that the remainder to *B* and his heirs in the case put is alienable by deed at common law, just as much as is the remainder to *B* in the case where the limitations are to *A* for life, remainder to *B* and his heirs, but if *B* dies before the termination of the particular estate, then to *C* and his heirs?

D. I do not.

S. Will you then, where the remainder is to *B* and his heirs, provided *B* survive the termination of *A*'s life estate, call the remainder 'vested'?

D. I cannot. That would violate the usage of centuries. It must be called 'contingent.'

S. Then here again your idea of the distinction between vested and contingent remainders cannot be said to be equivalent to the distinction between remainders which are alienable and those which are not.

D. That seems to be the case.

S. Do you think of any other case where the distinction between vested and contingent remainders seems important?

D. The Rule against Perpetuities does not apply where the limitations are vested. I think it does apply where they are contingent[1], and the recent authorities have so held[2].

S. The Rule against Perpetuities I suppose took the distinction between vested and contingent remainders as it found it?

D. Yes. The Rule against Perpetuities is comparatively modern, and it dealt only with an established distinction and did not make that distinction to suit itself.

S. Then the distinction between vested and contingent remainders is here a distinction which had served a practical purpose before the Rule against Perpetuities arose?

D. Yes.

S. What purpose had it served?

D. Let me see. I suppose I cannot say that it had marked the distinction between remainders which are destructible by a rule of law defeating intent and those which were, nor can I say that it marked the distinction between remainders which were alienable and those which were not.

S. Hardly. If it did, that would make the rule inapplicable to remainders clearly subject to a condition precedent in form and in

[1] Gray's Rule against Perpetuities, 2nd ed., § 284 et seq.
[2] *In re Frost*, 43 Ch. Div. 246.

fact, provided the settlor had added the express requirement that the remainder must stand ready to, or actually take effect, in possession, if at all, before or at the time of the termination of the preceding interest.

D. I could never agree to that.

S. The distinction between vested and contingent which the Rule against Perpetuities uses, then, serves no ordinary common law purpose. Did the Rule against Perpetuities then appropriate and build up a distinction to suit itself?

D. I have not so understood the situation.

S. Let us see. What does 'vested remainder,' as meaning an interest to which the Rule against Perpetuities does not apply, include?

D. It certainly includes future interests which are sure to take effect sometime, and, when they do, are bound by the express declaration of the settlor to do so by way of succession after a preceding estate of freehold.

S. The Rule does apply, I take it, where the future interest is absolutely sure to take effect sometime, but is not preceded by any particular estate either of freehold or of a term for years, as, for instance, to *B* and his heirs from and after the death or failure to exist of a person now unborn.

D. Yes.

S. What is the reason for the difference?

D. Again I suppose it is historical. The first non-contingent interest is a remainder, and it was known and recognized as valid long before the Rule against Perpetuities arose, so the application of the Rule to it was naturally excluded. With regard to the latter sort of non-contingent interest, it was at first wholly invalid, and became valid at all only after the Statutes of Uses and Wills of Henry VIII, and when in addition to the validity of these interests they became indestructible in 1620[1], they were most naturally the object of regulation by the Rule, and hence subject to it.

S. Nevertheless, you say that a legal contingent remainder—meaning thereby one that was subject to be destroyed by a rule of law defeating intent—is subject to the Rule against Perpetuities. Would not the same historical reasons cause the Rule not to apply to it?

D. Perhaps so. But the Rule against Perpetuities is a modern rule dictated by modern public policy, and the tendency naturally is to make it apply to all contingent future interests, and in spite

[1] *Pells* v. *Brown*, Cro. Jac. 590.

of a long list of eminent real property lawyers to the contrary [1] the modern cases have so declared [2].

S. Will the modern cases, then, go farther, and in holding the Rule against Perpetuities applicable to legal contingent future interests after a particular estate of freehold because they are contingent, declare it applicable to remainders subject to a condition precedent which you call vested?

D. For instance?

S. Suppose the limitations are to *A* for life, then to the unborn son of *A* for life, and then to *B* and his heirs, but if *B* or his issue do not survive the termination of the unborn son's life estate, then to *C* for life, is the remainder to *B* and his heirs void for remoteness? If it is, then, under the Rule of *Monypenny* v. *Dering* [3], the remainder to *C* for life must fail.

D. The point which you suggest has not, so far as I know, arisen.

S. Then you are in doubt as to whether in such a case the public policy in favour of the extension of the Rule against Perpetuities will prevail or the historical reason which caused the rule not to apply?

D. Yes, I am.

S. Frankly, now, is not your inclination to think that the public policy behind the Rule will prevail, and that the tendency will be to apply it wherever possible to contingent future interests?

D. I should certainly like to see such a step taken.

S. There then will be a class of what you call vested remainders to which the Rule against Perpetuities may apply, because they are in fact subject to a condition precedent to their ever taking effect in possession.

D. Indeed that would be true.

S. It would then appear that whatever your distinction between vested and contingent remainders may be, it does not mark the difference between those remainders which are destructible by a rule of law defeating intent and those that are not. It does not mark the difference between those that are alienable and those that are inalienable. If it in fact marks the difference between the remainders the Rule against Perpetuities applies to and those it does not, it seems to be an entirely modern distinction created

[1] 'The doctrine that contingent remainders are not subject to the modern Rule against Perpetuities is supported by the authority of the following judges and writers:—(1) Mr. Fearne, (2) Mr. Charles Butler, (3) Mr. Preston, (4) Mr. Burton, (5) The Real Property Commissioners (Lord Campbell, W. H. Tinney, Lewis Duval, John Hodgson, Samuel Duckworth, P. B. Brodie, and John Tyrrell), (6) Lord St. Leonards, (7) Mr. Joshua Williams, (8) Mr. George Sweet, (9) Mr. Leake, (10) Mr. Challis.' (Perpetuities, by Charles Sweet, L. Q. R. xv. 71, 85.) See also Challis, Real Property, 2nd ed., pp. 183–6.

[2] *In re Frost*, 43 Ch. Div. 246.

[3] 2 De G. M. & G. 145, 95 R. R. 52.

for the purposes of the Rule, and not a distinction which the Rule finds at hand ready made. But your distinction between vested and contingent remainders seems even to fail to mark the difference between remainders to which the Rule against Perpetuities applies and those to which it does not. Am I not right?

D. The dilemmas which you suggest certainly attend what I conceive to be the true distinction between vested and contingent remainders.

S. Would you then state of what use is your distinction? Why should any one pay the slightest attention to it or try to master it?

D. Its mastery is a tribute which the past exacts.

S. And the retort to oppressive demands for tribute is revolution.

ALBERT MARTIN KALES.

HISTORY OF CONTRABAND OF WAR.

The Development of the Doctrine of Contraband of War, and of certain allied doctrines, from the War of the Austrian Succession to the Declaration of Paris[1].

I. *Preliminary.*

It is explained in the preface to these two handsome volumes that they are the result of a suggestion made by the Inter-Departmental Committee of 1902 on Prize Law. It is as characteristic of the English law of prize as of the other branches of our jurisprudence that in comparison with case law all other sources sink into insignificance. Though England has always been one of the most formidable, and not always the least aggressive, of the maritime belligerents, and therefore has always had the keenest practical interest in the law of prize; yet not one of the classical writers on International Law was of English birth. The only Englishman whose authority on this subject stands at a dizzy height above all others was a judge, and not a writer of a systematic treatise. In the department of prize law the influence of Lord Stowell is paramount. He had a unique opportunity, and the use that he made of it was unique. His judgments are the foundation-stone of the law—'well and truly laid.' It is therefore meet that just a hundred years after the most important of them were delivered they should be reprinted in a handy and accessible form. The editing of these volumes is all that we should expect from such an acknowledged master of maritime law as the Admiralty Registrar of the Supreme Court. The edition contains, not a collection of leading cases, but a complete corpus of all the cases that appear to be of value. The arguments of counsel have generally been entirely omitted, but a new and uniform series of head-notes has been supplied. The Table of Cases, both chronological and alphabetical, the Index, and the marginalia, all show evidence of the greatest care, and we venture to predict that for the future these volumes will prove indispensable to all engaged either in the study or the practice of the subject of which they treat. The paper and print of the edition appear to be of excellent quality, as indeed they ought to be

[1] Reports of Prize Cases determined in the High Court of Admiralty, before the Lords Commissioners of Appeals in Prize Causes, and before the Judicial Committee of the Privy Council, from 1745 to 1859. Edited by E. S. Roscoe. 2 vols. xlviii and 650 and xxxii and 660 pp. Royal 8vo. 1905. London: Stevens & Sons, Ltd. Price £2 10s.

considering the high price charged, and the handsome half-morocco binding is a great improvement upon the customary law calf, which we trust it is destined to displace entirely in the future.

In this connexion we venture to make one suggestion; viz. that it would be a great advantage if a reprint of the best American cases on the same subject could also be arranged. They are far more inaccessible to the English jurist or practitioner than his own prize cases were before the publication of the present edition, but no one can doubt that in any future discussion of the subject they will be extensively quoted. The following words of the late Sir William Harcourt supply authority, if authority be needed, for this proposition:—

'But of all the sources of authority on these subjects, the most valuable—though unfortunately in this country not the best known—are the decisions of the American Courts. The policy of neutrality and peace which was, until the late unhappy events, the sacred tradition of the United States, has brought it about that the Rights and Duties of Belligerents and Neutrals have been more fully and minutely discussed in the jurisprudence of that country than in that of our own. No praise too high can be awarded to a body of decisions which for learning, impartiality, logic, and good sense are unsurpassed in judicial annals[1].'

We propose with the aid of these volumes to trace the development of the doctrine of Contraband of War and of certain allied principles, so far as they are illustrated by English practice and decision. It is not pretended that such a study is founded on new or unpublished sources of information, but as writings on the pure history of International Law are not very numerous (although all textbooks on the subject are bound to assume an historical tinge more or less deep), we venture to hope that such a study will not prove altogether devoid of interest.

II. *The period previous to* 1745.

The first case reported by Mr. Roscoe is the *Med Guds Hielpe*, decided in 1745, during the War of the Austrian Succession, but it appears necessary to glance briefly at some of the more salient points in the development of the law before that date.

Contraband of War is a portion of the Law of Neutrality, and during the middle ages there was, speaking generally, no conception of the idea of neutrality either in theory or in practice. The dominant political idea of mediaeval times was that of a world-wide Empire, and the correlative one of a world-wide Church. The practice diverged from the theory, and the severance between the

[1] Letters by Historicus on some questions of International Law. 1863. Preface, p. ix.

two became wider and wider as the dominant political idea of modern times—that of nationality—gained ground. But in theory strife within the Empire could not be a matter of indifference to any member of the Empire; and strife within the Church was a matter upon which no Christian could be neutral. The Law of Neutrality first began to take shape among the trading cities of the Mediterranean seaboard, and their position is thus summarized by the chief living authority on the History of International Law:—

'The Venetians and Genoese when at war searched the ships of the neutral Greeks and made prisoners of the subjects of their opponents found hidden on board. The framers of the *Consolato del Mare*, following the terms of various treaties of the thirteenth and fourteenth centuries, adopted in respect of property found upon the high seas the simple rule, "Confiscate the goods of your enemy; respect the property of your friend." They declared for the condemnation of an enemy's goods found under the neutral flag and for the release of neutral property laden on board a captured belligerent vessel, regulating equitably in either case the question of freight. There are not wanting suggestions of a more severe practice which confiscated the friendly vessel laden with hostile goods. The neutral vessel whose master refused to carry belligerent goods to the port designated by the captor, might, according to the rules of the Consolato, be sent to the bottom without any compensation to its owner[1].'

In England the question of neutrality first becomes a matter of prime importance in the reign that we are accustomed to associate with 'spacious days.' There is little doubt that to the seamen who then carried the English flag over every portion of the high seas the distinction between privateering and piracy would have appeared 'too fine for their comprehension.' Nor, indeed, was the government above taking advantage of proceedings that can only be described as highly irregular; and justifying first one course of action and then the opposite just as it suited their purpose—a proceeding from which politicians are not altogether exempt even in these days of science and legality. A recent paper[2] has, however, shown that the counsellors of the Great Queen had the root of the matter in them. They laid down the essential principles of contraband in a way that Lord Stowell would not have complained of, and whenever an occasion offered they enforced it with consistency.

The position of affairs gave an excellent opportunity of laying down such a doctrine. England and Spain were always in a state of mutual hostility and usually at war with one another. Spain drew immense wealth in gold and silver from the Indies, but was

[1] T. A. Walker, History of the Law of Nations, vol. i, p. 136.
[2] International Law under Queen Elizabeth, by Edward P. Cheney. Eng. Hist. Review, October, 1905, vol. xx, p. 659.

very insufficiently provided with the munitions of naval warfare. Her chief supplies of these were drawn from the Hanse towns and the northern powers. Such being the facts, in November, 1588, Maurice Timberman, Alderman of the Steelyard, was summoned before the Privy Council and requested to inform the Hanse cities that they were required

'to forbeare to send into Spain and Portugal any kind of provision fitt for the maintenance of the king of Spayne for his warres against this realm, upon paine of confiscation of the same goodes and the shippes upon which they should be laden, in case they should be taken with any such warlyke provision by any of her majesties shippes or of her subjects.'

In the following year these principles were put into force with a vengeance, when a fleet of sixty ships belonging to the Hanse merchants were captured at the mouth of the Tagus, and by the special grace and favour of the Queen 'such things manifestly of the proper nature of victualls and of munitions' only were confiscated. We transcribe the list here because it is of especial interest as being the earliest list of contraband articles, and because it shows that the Queen's advisers had apparently no doubt whatever on the subject of the *Nobilissima Juris Gentium Quaestio*, viz. whether provisions are Contraband of War.

Munitions.

cables	tallow	brimstone	ordinance (not belonging to the ship)
masts	pitchstones	saltpeter	
anchors	callyvers	boulletts	
cordage	muskettes	copper	canvas
pitch	armour	leade	Dantzig poldaynes.
tarre	powder	matche	

Victuals.

bacon	corne	wheat	rye
barley	meale	beanes	

peason and such like.

The seizure was justified on the same ground that had been used in arguing with the Alderman of the Steelyard—that a neutral was not justified in assisting a belligerent by supplying him with articles of contraband.

In 1625 was published the great work of Grotius, whose threefold division of all articles into—

(1) Things of use in war alone;
(2) Things useless in war; and
(3) Things useful both in war and peace;

with the concomitant classification of absolute contraband, non-contraband, and conditional contraband, has been the basis of all future discussion on the subject. The word contraband in its modern sense is not actually employed by Grotius, but in the same year in which his work was published it was so used for the first time, in the Treaty of Southampton between England and the United Provinces.

It does not appear to be profitable to examine the numerous treaties of the seventeenth and early eighteenth centuries, because they do not really advance the matter at all. In 1674 Sir Leoline Jenkins expressed the opinion as to a Swedish vessel laden with naval stores, that it was

'not probable that Sweden hath suffered or allowed in any treaty of theirs with Spain, that their own native commodities should be reputed contraband. These goods, therefore, if they be not made unfree by being found in an unfree bottom, cannot be judged by any other law than by the general law of nations; and then I am humbly of opinion that nothing ought to be judged contraband by that law in this case but what is directly and immediately subservient to the uses of war, except it be in the case of besieged places, or of a general notification made by Spain to all the world, that they will condemn all the pitch and tar they meet with[1].'

This view would appear to be the one generally adopted by the English Government[2], but the practice varied very greatly, and the opinions of the jurists during this period are as irreconcilable as the practice of the nations. Hall sums up the position by saying:

'On comparing the jarring opinions of these different authors with the treaties which have been enumerated, and with the indications of unilateral practice which here and there occur in history, it seems to stand out with tolerable clearness that no distinct rule existed in the eighteenth century with regard to the classification of merchandise as innocent or as contraband. On the one hand, there is no doubt that France thought it to her interest to restrict the number of articles classed under the latter head; on the other it is as evident that England wished to preserve entire freedom of action; but the position of other nations is not so certain, and the extended catalogues which were sanctioned by a German, a Swiss, and a Frenchman, must have been grounded on a wider opinion than could be evidenced by the practices of England and Holland alone[3].'

[1] Life and Correspondence of Sir Leoline Jenkins, vol. ii, p. 751. This does not seem to be quite correctly quoted by Hall in his treatise. There is nothing directly said about each nation drawing up a list of contraband articles, *at the opening of the war*.

[2] Vide the note in Burrell's Admiralty Reports, p. 378. It would appear from this that in 1741 contraband articles were considered by England, apart from treaty, to be confined to arms, saltpetre, and horses with their furniture.

[3] Hall. International Law, p. 646.

III. *The Med Guds Hielpe.*

Our period opens with the famous and much argued case of the *Med Guds Hielpe* [1], decided in 1745. The judge of the Prize Court (Sir Henry Penrice), whose decision was afterwards upheld on appeal, enumerated the three classes of articles according to the classification laid down by Grotius, and decided that pitch and tar belonged to the class of conditional contraband, and further enunciated the proposition that 'sovereign princes at war may declare such and such things to be contraband, and, after notice to their allies, their subjects may certainly seize them.' In the result both ship and cargo were condemned. We may, therefore, summarize the English view of contraband at this time in the following five propositions:—

1. Contraband consists of two classes—absolute and conditional.

2. Apart from treaty articles absolutely contraband are arms, saltpetre, and horses with their furniture [2].

3. The contraband character of articles of a mixed nature is determined by their destination.

4. Sovereigns may extend the list of contraband articles by a declaration communicated to their allies [3].

5. The penalty for carrying contraband is condemnation both of ship and cargo.

IV. *The Silesian Loan.*

The case of the Silesian Loan in 1752–3 is one of the most renowned in the annals of this country. Frederick the Great, when the Province of Silesia was ceded to him in 1742, had undertaken to assume responsibility for a loan made in 1735 by some English merchants to the Austrian Empress Maria Theresa. This loan was secured upon the revenues of the ceded province. During the War of the Austrian Succession a number of Prussian vessels had been condemned by the British Prize Courts for carrying contraband of war. The Government of the Prussian King alleged that these condemnations were improper, and applied for indemnity, and upon this being refused, appointed a commission to examine the claims. The commission decided that the condemnations were improper, and proceeded to assign the British mortgage to the Prussian claimants by way of indemnity. This finding of the commission was justified

[1] I. R. P. C. 1. We propose to cite Mr. Roscoe's work as R. P. C. for Roscoe's Prize Cases.

[2] Vide the note in Burrell cited above.

[3] Unless there is an error in the report of the *Med Guds Hielpe* it does not appear to have been considered necessary that the declaration should have been communicated to the enemy or neutrals. This seems so unreasonable that possibly the report is incorrect.

by an *exposition des motifs*, which is of great importance as containing a résumé of what we may term the continental view of contraband as opposed to the British or maritime view. This divergence of view was as patent at the meeting of the Institute of International Law in 1896 as it was in 1752, and it is therefore of great value to be supplied at the outset with an exposition of the continental theory issued, not by an irresponsible jurist, but under the authority of one of the great powers. The document contains the following propositions:—

'1. That the sea is free for the common use of all mankind; that no one nation can appropriate it for its own exclusive benefit; and consequently the right of navigating it cannot be lawfully interrupted by a state of war so far as neutrals are concerned.

2. That even enemy's property cannot, by the law of nations, be taken in a neutral place, such as is a neutral vessel on the high seas. [This is the well-known principle contended for by neutrals with a persistency sharpened by pecuniary interest, of *free ships, free goods*, with the fiction of the territoriality of the merchant vessel tacked on to it.]

3. That the only exception to this general principle is that of contraband articles going to an enemy's use.'

It then proceeds to argue that Great Britain had in her treaties with Holland and other maritime powers confined the list of contraband to munitions of war, expressly excluding provisions and naval stores, except in the single case of a blockaded port.

'4. That the British Courts of Admiralty had no right to exercise jurisdiction over Prussian vessels, and their cargoes the property of Prussian subjects, taken in a place not within the British territory.

5. That the exercise of this pretended jurisdiction by the unjust confiscation of Prussian property furnished a just ground for reprisals on the part of Prussia by the sequestration of the capital and interest of the Silesian Loan due to British creditors[1].'

The British reply was the work of Lee, Park, Ryder, and Murray, and there are reasons for thinking that it is to Murray (afterwards Lord Mansfield) that we chiefly owe this masterly document. Montesquieu is recorded to have described it as 'une réponse sans réplique,' and as an example of the reasoning of the English school of international jurists it is surpassed only by the judgments of Lord Stowell. We shall, therefore, not hesitate to quote from it largely.

The English writers 'for the greater perspicuity' arrange their arguments under the headings:—

[1] Wheaton, History of the Law of Nations, p. 209.

1. To state the clear established principles of law.
2. To state the facts.
3. To apply the law to the fact.
4. To criticize the *exposition des motifs*, &c.

The first and most important part of the argument, the statement of the law, is as follows:—

'When two powers are at war they have a right to make prizes of the ships, goods, and effects of each other upon the high seas: whatever is the property of the enemy may be acquired by capture at sea; but the property of a friend cannot be taken, provided he observed his neutrality.

Hence the law of nations has established:—

That the goods of an enemy on board the ship of a friend may be taken.

That the lawful goods of a friend on board the ship of an enemy ought to be restored.

That contraband goods going to the enemy, though the property of a friend, may be taken as prize, because supplying the enemy with what enables him better to carry on the war is a departure from neutrality.

By the maritime law of nations universally and immemorially received, there is an established method of determination, whether the capture be, or be not, lawful prize.

Before the ship or goods can be disposed of by the captor there must be a regular judicial proceeding wherein both parties may be heard, and condemnation thereupon as prize in a Court of Admiralty, judging by the law of nations and treaties.

The proper and regular Court for these condemnations is the Court of that state to whom the captor belongs.

The evidence to acquit or condemn, with or without costs or damages, must, in the first instance, come merely from the ship taken, viz. the papers on board and the examination on oath of the master and other principal officers; for which purpose there are officers of Admiralty in all the considerable seaports of every maritime power at war, to examine the captains and other principal officers of every ship brought in as prize, upon general and impartial interrogatories. If there do not appear from thence ground to condemn as enemy's property, or contraband goods going to the enemy, there must be an acquittal; unless from the aforesaid evidence the property shall appear so doubtful that it is reasonable to go into the further proof thereof.

A claim of ships or goods must be supported by the oath of somebody, at least as to belief.

The law of nations requires good faith; therefore every ship must be provided with complete and genuine papers, and the master at least should be privy to the truth of the transaction.

To enforce these rules, if there be false or colourable papers, if any papers be thrown overboard, if the master and officers examined *in praeparatorio* grossly prevaricate, if proper ship's papers are not on

board, or if the master and crew cannot say whether the ship or cargo be the property of a friend or enemy, the law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received, by the claimant in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause the captor is adjudged to pay costs and damages, for which purpose all privateers are obliged to give security for their good behaviour; and this is referred to, and expressly stipulated by, many treaties.

Though, from the ship's papers, and the preparatory examinations, the property do not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect; if he will not show the property by sufficient affidavits to be neutral it is presumed to belong to the enemy. Where the property appears from evidence not on board the ship the captor is justified in bringing her in, and excused paying costs, because he is not in fault; or, according to the circumstances of the case, may be justly entitled to receive his costs.

If the sentence of the Court of Admiralty is thought to be erroneous there is in every maritime country a superior court of review, consisting of the most considerable persons, to which the parties who think themselves aggrieved may appeal; and this superior court judges by the same rule which governs the Court of Admiralty, viz. the law of nations, and the treaties subsisting with that neutral power whose subject is a party before them.

If no appeal is offered it is an acknowledgment of the justice of the sentence by the parties themselves, and conclusive.

This manner of trial and adjudication is supported, alluded to, and enforced by many treaties.

In this method all captures at sea were tried during the last war by Great Britain, France, and Spain, and submitted to by the neutral powers. In this method, by Courts of Admiralty acting according to the law of nations and particular treaties, all captures at sea have immemorially been judged of in every country of Europe. Any other method of trial would be manifestly unjust, absurd, and impracticable.

Though the law of nations be the general rule, yet it may, by mutual agreement between two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as it is not derogated from by the treaty.

Thus by the law of nations, where two powers are at war, all ships are liable to be stopped and examined to whom they belong, and whether they are carrying contraband goods to the enemy; but particular treaties have enjoined a less degree of search on the faith of producing solemn passports and formal evidences of property duly attested.

Particular treaties too have inverted the rule of the law of

nations, and by agreement declared the goods of a friend on board the ship of an enemy to be prize, and the goods of an enemy on board the ship of a friend to be free, as appears from the treaties already mentioned, and many others.

So likewise by particular treaties some goods reputed contraband by the law of nations are declared to be free.

If a subject of the King of Prussia is injured by or has a demand upon any person here, he ought to apply to your majesty's courts of justice, which are equally open and indifferent to foreign or native; so, vice versa, if a subject here is wronged by a person living in the dominions of his Prussian majesty, he ought to apply for redress in the King of Prussia's courts of justice.

If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions.

The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied *in re minime dubia* by all the tribunals, and afterwards by the prince.

Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no ground for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is that justice should be impartially administered to him, as it is to the subjects of that prince in whose courts the matter is tried [1].'

The subsequent portions of the memorial consist of the application of these doctrines and a detailed examination of the Prussian contentions by the light of them, wherein they are driven home in a way that leaves little more to be said. It is worth while to quote the answer to the proposition that free ships make free goods.

'The contrary is too clear to admit of being disputed. It may be proved by the authorities of every writer of the law of nations; some of different countries are referred to. (A note mentions the Consolato del mare, Grotius, Locenius, Voet, Heineccius, Bynkershoek, and Zouch.) It may be proved by the constant practice, ancient and modern; but the general rule cannot be more strongly proved than by the exceptions which particular treaties have made to it [2].'

The matter was ultimately adjusted by a compromise in the treaty of 1756—the sequestration of the Silesian loan was abandoned, and the British Government paid a sum of £20,000 in satisfaction of the Prussian claims.

[1] Collectanea Juridica, vol. i, pp. 134-9; also in Holliday's Life of Lord Mansfield, to whom the authorship is there positively ascribed.

[2] Coll. Jur., vol. i, p. 145.

V. *The First Armed Neutrality*, 1780.

Putting aside for the present the question of the Rule of the War of 1756, which only affects the doctrine of contraband indirectly, through the subsidiary doctrine of continuous voyages, we pass to the formation of the First Armed Neutrality in 1780—a confederation not inaptly termed by its authoress, Catherine the Great, 'nullité armée'; and described by Carlyle with his usual vigorous imagery as 'rose-pink philanthropy.' Its formation was the result partly of an intrigue in the Russian Court, partly of the influence of Frederick of Prussia. At that time 'splendid isolation' correctly describes the position of this country. The phrase indeed had not been invented, but the thing itself was very real. England was being drained of men and money by the fight against her revolted colonists in America; France and Spain had eagerly joined in the struggle as soon as it appeared that the Colonists might win; she had no reliable ally among all the nations; and if Holland and the Northern Powers joined the number of her enemies she would be waging war single-handed against a world in arms.

All the Northern Powers exported largely timber, hemp, pitch, tar, cordage, provisions, and like articles, all coming under the class of conditional contraband and all required for naval purposes by the belligerent powers. The principles adopted by France and Spain were indeed more severe towards neutrals than those enforced by Great Britain; but, by the treaty made in 1778 with the United States, France had receded from the terms of the Ordinance of 1681, and had, subject to certain practical restrictions, adopted the rule that free ships make free goods[1], and had moreover issued an ordinance extending the benefit of this stipulation to all neutral powers. The factor of chief importance, however, was not the paper declarations of any of the powers engaged, but the fact that the maritime superiority of England enabled her to enforce her views with more vigour than her opponents. The theory might be the same on both sides, but it was the practical application of it that was felt.

Sir James Harris, the British Ambassador at the Russian Court, was endeavouring to bring about an alliance between the two countries, and was supported by Potemkin, then the chief favourite of the Empress. Panin, the Chancellor of the Empire and the rival of Potemkin, backed by the influence of Frederick of Prussia, produced a counter scheme calculated to benefit Russian commerce, and at the same time to enable Catherine to pose as the protectress of the North. The arguments of Panin and the influence of Frederick

[1] Wheaton, op. cit., p. 294.

prevailed, and on February 26, 1780, the circular declaration was signed embodying the following rules:—

1. All neutral vessels may freely navigate from port to port, and on the coasts of nations at war.

2. Goods belonging to belligerents shall be free in neutral vessels, except contraband articles.

3. Contraband articles are defined by reference to the treaty of 1766 between England and Russia. They are thereby confined to munitions of war, and are enumerated as 'canons, mortiers, armes à feu, pistolets, grenades, boulets, balles, fusils, pierres-à-feu, mêches, poudre, salpêtre, souffre, cuirasses, piques, épées, ceinturons, poches à cartouche, selles et brides, au delà de la quantité qui peut être nécessaire pour l'usage du vaisseau, etc.[1]'

4. To determine the nature of a blockaded port there must be present a sufficient naval force to make the attempt to enter evidently dangerous.

The declaration was accepted with enthusiasm by France and Spain, by all the Northern Powers, in fact by all Europe. The English ministry, placed in a position of great danger, returned an answer framed with the utmost politeness but committing them to nothing, and the complete assertion of their principles was allowed to slumber until a more convenient season. The smaller neutral nations, particularly Denmark, adhered to the principles of the armed neutrality with scrupulous consistency, but so far as the Great Powers were concerned the declaration proved one of small immediate importance, for they all scattered its rules to the four winds as soon as it appeared to be to their interests to do so. Some of its principles were adopted in the Convention of St. Petersburg signed after the second armed neutrality, and others of its main doctrines were ultimately acknowledged by the Declaration of Paris in 1856.

H. J. RANDALL.

(To be continued.)

[1] Wheaton, op. cit., p. 298, note quoting Martens, Recueil, tome I, p. 395.

THE MEANING OF COASTING-TRADE IN COMMERCIAL TREATIES.

I.

AFTER having acquired, in 1898 and 1899, the Philippines, the Hawaian Islands, and the Islands of Porto Rico, the United States of America has declared trade between any of her ports and these islands to be *coasting-trade*, and has exclusively reserved it for American vessels. Russia has by Ukase of 1897, operating from 1900, enacted that trade between any of her ports and that of Vladivostock is to be considered as *coasting-trade*, and therefore to be exclusively reserved for Russian vessels. At the first and the second Colonial Conference, held in London in 1902 and 1907 respectively, the question has been raised whether Great Britain would be justified in following these examples set by America and Russia, and in giving the term coasting-trade, as used in British commercial treaties, such an extension of definition as would allow her to exclude foreign shipping entirely from the carrying trade between the United Kingdom and Australia, India, South Africa, and other parts of the Empire, as well as between any of these parts. It is therefore of interest to inquire into the question what is the meaning of the term *coasting-trade* in International Law generally and in commercial treaties in particular.

II.

In the endeavour to trace the meaning of this term in commercial treaties and International Law no consideration need be given to the fact that sometimes municipal laws in making use of the term coasting-trade or cabotage for the purposes of municipal regulations as regards the loading of vessels, the appointment of shippers, and the like, attach a meaning to this term absolutely different from the meaning it has or can have in International Law. Thus in France, a Statute of June 14, 1854, distinguishes between navigation *au long cours*, *au cabotage*, and *au bornage*. Navigation *au bornage* comprises voyages within fifteen miles from the port where a vessel is registered. Navigation *au cabotage* comprises voyages beyond fifteen miles, but within the wide zone beyond which navigation *au long cours* begins. Again in France, a Statute of

January 31, 1893, distinguishes between navigation *au long cours*, *au cabotage international*, and *au cabotage français*. Navigation *au cabotage français* comprises voyages between French or between French and Algerian ports. Navigation *au cabotage international* comprises voyages which are not such *au cabotage français*, but within the wide zone beyond which navigation *au long cours* begins.

It is obvious, and it is generally recognized, that these *municipal* uses of the term cabotage or coasting-trade have nothing to do with its *international* use.

III.

The original meaning of coasting-trade in International Law generally becomes apparent through its synonym *cabotage*. This is a nautical term, and means, as its Spanish origin indicates, navigating from cape to cape along the coast without going out into the open sea. In International Law cabotage is identified with coasting-*trade*, so that it means navigating *and* trading along a coast between the ports thereof. This is the original meaning of the term coasting-trade in International Law as used in the universally recognized rule of the Law of Nations that every littoral State can exclude foreign merchantmen from the cabotage within the maritime belt just as it can exclude foreigners from the fisheries therein. This rule is an outcome of the fact that the maritime belt up to at least three miles from the shore is considered a part of the territory and under the sovereignty of the littoral State. Such State is indeed prevented by International Law from prohibiting the peaceful *passage* of foreign merchantmen through its maritime belt on their way from one part of the globe to another, but it need not allow them to navigate and trade along its own coast from one port thereof to another. Cabotage in this meaning of coasting-trade is the contrast to navigation on the open sea and to over-sea carrying trade between distant parts of the globe, and it has nothing to do with the question of free trade from or to a port on the coast to or from a port abroad. This question is a matter of commercial policy. International Law has in the past never prevented, and does not at present prevent, a State—apart from arrangements by commercial treaties—from restricting the export from or the import to its ports to vessels of its subjects, or from allowing such export and import under certain conditions only.

IV.

But is this original meaning of coasting-trade in International Law identical with its meaning according to such commercial treaties as stipulate that the coasting-trade of each party should be

reserved for vessels of its own subjects or should be open to each other's subjects? The question whether the term coasting-trade as used in commercial treaties could mean anything else but navigation and trading from one port to another of the same coast of a country could never have arisen but for two facts. There are, first, some littoral States which have more than one stretch of coast, such as France, for instance, with one stretch of coast in the Mediterranean and another in the Atlantic Ocean. And there are, secondly, some countries whose territory is dismembered and consists of parts, which, although forming a political and geographical unit, are separated by the sea, as, for instance, Great Britain in relation with Ireland, the Isle of Man, and the like. If we adhere to the original meaning of coasting-trade, we have to distinguish a coasting-trade along each coast of countries with more than one stretch of coast, and also a coasting-trade along each coast of each part of a dismembered territory. Trade between Marseilles and Nice, between Calais and Havre, between London and Liverpool, and between Dublin and Belfast would then be coasting-trade, but not trade between Marseilles and Havre, and between London and Dublin.

If we look at the practice of the countries concerned the conclusion is inevitable that the original meaning of coasting-trade has been considerably stretched and extended. There is, indeed, an instance which shows that the original meaning of the term has been retained, for Russia formerly—see Ukase of July 1, 1845, concerning cabotage and rights of importation—held to the original meaning by enacting: 'Cabotage, that is, the carriage of goods from one Russian port to another *situated within the same sea*, continues to be exclusively reserved for Russian subjects and vessels sailing under the Russian flag.' But more instances can be given which show an extension of the original meaning so that coasting-trade or cabotage include navigation and trade between two ports of the same territory whether they are on the same coast of the territory concerned or on different coasts thereof.

Thus France distinguishes between cabotage *petit* and *grand*; whereas *petit* cabotage is coasting-trade between ports in the same sea, *grand* cabotage is coasting-trade between a French port situated in the Atlantic Ocean and a French port situated in the Mediterranean, and—according to a Statute of September 21, 1793—both *grand* and *petit* cabotage are exclusively reserved for French vessels.

Thus, further, the United States of America has always considered trade between one of her ports in the Atlantic Ocean and one in the Pacific to be coasting-trade, and has exclusively reserved it for vessels of her own subjects. She considers such trade coasting-trade

even when the carriage takes place not exclusively by sea around Cape Horn, but partly by sea and partly by land through the Isthmus of Panama.

Great Britain has taken up a similar attitude. Section 2 of the Navigation Act of 1849 (12 & 13 Vict. c. 29) enacted 'that no goods or passengers shall be carried *coastwise* from one part of the United Kingdom to another, or from the Isle of Man to the United Kingdom, except in British ships,' and declared thereby trade between a port of England or Scotland to a port of Ireland or the Isle of Man to be coasting-trade exclusively reserved for British ships in spite of the fact that the open sea flows between these ports. And although the Navigation Act of 1849 is no longer in force, and this country does now admit foreign ships to its coasting-trade, it nevertheless still considers all trade between one port of the United Kingdom and another to be coasting-trade, as becomes apparent from Section 140 of the Customs Laws Consolidation Act of July 24, 1876 (39 & 40 Vict. c. 36).

Again, Germany declared by a Statute of May 22, 1881, coasting-trade to be trade between any two German ports, and reserved it for German vessels, although vessels of such States can be admitted as admit on their part German vessels to their own coasting-trade. Thus trade between Koenigsberg in the Baltic and Hamburg in the North Sea is coasting-trade.

These instances are sufficient to demonstrate that an extension of the original meaning of coasting-trade has really taken place and has found general recognition. A multitude of commercial treaties has been concluded between such countries as established that extension of meaning and others, and these commercial treaties no doubt make use of the term coasting-trade in this its extended meaning. It must, therefore, be maintained that coasting-trade or cabotage as used in commercial treaties has acquired the following meaning: *Sea-trade between any two ports of the same country whether on the same coast or different coasts, provided always that the different coasts are all of them the coasts of one and the same country as a political and geographical unit in contradistinction to the coasts of Colonial dependencies of such country.*

V.

In spite of the established extension of the term coasting-trade, it did not include Colonial trade, and it remained restricted to trade between two ports of a country as a political and geographical unit, although such ports might be situated on different coasts. This becomes clearly apparent from International documents as well as from municipal Statutes.

Instances of the former are the Russian Declaration of February 28, 1780, which established the First Armed Neutrality, and the Maritime Convention of St. Petersburg of June 17, 1801, between Russia and Great Britain. England by the so-called rule of 1756 had pronounced the principle that the commerce of neutrals should in time of war be restricted within the same limits as in time of peace, and that consequently such countries as reserved in time of peace their cabotage and Colonial trade for vessels of their own subjects could not in time of war throw open such trade to vessels of neutrals. The first principle of the First Armed Neutrality contested this rule of 1756, pronouncing: *Que les vaisseaux neutres puissent naviguer librement de port en port et sur les côtes des nations en guerre*, and Article III, No. 1, of the quoted Maritime Convention stipulated the same rule as between Russia and England. Now the fact that here is stipulated freedom of navigation from port to port of a belligerent besides navigation *sur les côtes* would clearly indicate the conviction that there is a difference between the two. And the difference is that navigation *sur les côtes* is coasting-trade or cabotage, whereas navigation from port to port embraces the Colonial trade.

An instance of Municipal Statutes is Section 736 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), which, repeating a provision of repealed Statutes, enacts:—

'The legislature of a British possession may, by any Act or Ordinance, regulate the coasting-trade of that British possession, subject in every case to the following conditions: (*a*) . . . (*b*) . . . (*c*) Where by treaty made before the passing of the Merchant Shipping (Colonial) Act, 1869 (that is to say, before the thirteenth day of May, eighteen hundred and sixty-nine), Her Majesty has agreed to grant to any ships of any foreign state any rights and privileges in respect of the coasting-trade of any British possession, those rights and privileges shall be enjoyed by those ships for so long as Her Majesty has already agreed or may hereafter agree to grant the same, anything in the Act or Ordinance to the contrary notwithstanding.'

This distinction between the coasting-trade of the different British possessions is sufficient to indicate that in the eye of the legislator coasting-trade of a British possession is trade along the coast of the possession concerned in contradistinction to over-sea-trade between a port of the mother-country and a port of a possession.

In this respect it is likewise of value to draw attention to a French Statute of April 2, 1889. Whereas a Statute of April 9, 1866, had thrown open the trade between France and Algeria to vessels of all nations, Article 1 of the Statute of April 2, 1889, enacts: *La navigation entre la France et l'Algérie ne pourra s'effectuer*

que sous pavillon français. This French Statute does not, as is frequently maintained, declare the trade between France and Algeria to be coasting-trade, but it nevertheless reserves such trade exclusively for French vessels. The French Government, in bringing the bill before the French Parliament, explained that the Statute could not come into force before February 1, 1892, because Art. 2 of the treaty with Belgium of May 14, 1882, and Art. 21 of the treaty with Spain of February 6, 1882—both treaties to expire on February 1, 1892—stipulated the same treatment for Belgian and Spanish as for French vessels, *cabotage excepted.* It is quite apparent that, if France had declared trade between French and Algerian ports to be coasting-trade in the meaning of her commercial treaties, the expiration of the treaties with Belgium and Spain need not have been awaited for putting the law of April 2, 1889, into force.

VI.

The distinction between coasting-trade even in its extended meaning and Colonial trade remained unshaken throughout the nineteenth century up to 1898 and 1899, when the United States of America declared trade between her ports and those of Porto Rico, the Philippines, and the Hawaian Islands to be coasting-trade, and consequently reserved it exclusively for American vessels. On the other hand, the fact that Russia by Ukase of 1897, operating from 1900, has enacted that trade between any of her ports, on whatever coast they are situated, is considered to be coasting-trade and reserved for Russian vessels, does not extend the meaning of the term coasting-trade beyond the scope it attained during the last two centuries. Russia, although her territory extends over different parts of the globe, is a political and geographical unit, and there is one stretch of territory only between St. Petersburg and Vladivostock. America is, therefore, the only country as yet which has given to the term coasting-trade such a meaning as to include the whole of the trade of a country with its Colonial dependencies. Now it has already been mentioned that the United States has in her commercial treaties stipulated the exclusion of foreign vessels from the American coasting-trade. Article 10 of the commercial treaty of November 22, 1894, between the United States and Japan, furnishes an example of this American commercial policy. And the question therefore arises whether the United States could without violating the treaty rights of the other contracting parties to her commercial treaties extend the meaning of the term coasting-trade to such a width as to include trade between her territory

and that of the dependencies beyond the sea acquired by her in 1898 and 1899.

It has been demonstrated above that the original meaning of coasting-trade in International Law has been considerably stretched and extended and now designates trade between any two ports of the same country as a political and geographical unit. It is obvious that the term coasting-trade cannot stand any further stretching and extension without losing altogether its typical meaning as a synonym of cabotage. Definitions and conceptions are, like anything else, to a certain extent flexible and elastic. In the general development of things and affairs they naturally have to undergo extensions and restrictions according to the always changing circumstances and conditions in the life of individuals and nations. But there is a limit beyond which extension cannot be carried without completely destroying the very definition and conception concerned, just as the attempt to stretch an elastic band beyond a certain limit tears it to pieces. There has always been a distinction between coasting-trade and Colonial trade. Should the requirement be dropped that the country between the ports of which trade is called coasting-trade must be a political and geographical unit, the distinction between coasting-trade and Colonial trade would become void. The latest American extension of the meaning of coasting-trade is therefore inadmissible and comprises a violation of the treaty rights of the parties which have concluded such commercial treaties with the United States as stipulate freedom of trading, coasting-trade excepted. I do not know whether any of these parties has raised a protest, but however that may be, the United States adheres to her interpretation, and there is no sign that she will in the future alter her attitude. Under these circumstances all those States which now conclude commercial treaties with her will have to accept that construction upon the meaning of coasting-trade which it has pleased her since 1898 to apply. And should other countries follow the American lead and apply the term coasting-trade indiscriminately for trade along their coasts and for their Colonial trade, the meaning of the word would then become trade between any two ports which are under the sovereignty of the same power, and it would then, as pointed out above, be no longer synonymous with cabotage.

L. OPPENHEIM.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Laws of England. By the Right Honourable the EARL OF HALSBURY and other lawyers. In about 20 volumes (25*s.* net per volume in cloth). Vol. II: Bankruptcy to Bills of Exchange. London: Butterworth & Co. 1908. La. 8vo. clviii and 580 pp. (besides index).

THERE are only four treatises in this volume, namely those on Bankruptcy and Insolvency; Barristers; Bastardy; and Bills of Exchange, Promissory Notes, and Negotiable Instruments. But of course there are numerous other headings with cross-references. The subject of Bankruptcy and Insolvency is dealt with by Mr. M. Muir Mackenzie (an Official Referee, and Chairman of the Committee on Bankruptcy Law, and previously a well-known expert in bankruptcy law and procedure) and Mr. E. H. Tindal Atkinson, who have been assisted by Mr. G. W. Chapman (Official Receiver in Bankruptcy), Mr. Ringwood (who had previously written on the subject), Mr. A. Romer Macklin (who has assisted in Lord Justice Vaughan Williams's book on bankruptcy), and some others. This treatise occupies 603 numbered paragraphs, and is well arranged. It appears to be a complete statement of bankruptcy law and practice, and comprises the law relating to Compositions and Arrangements apart from the Bankruptcy Acts, and also the Debtors Acts, with the decisions thereon.

For the law as to Banns, Baptism, Barbed Wire, Baronets, and other matters, we must wait until later volumes appear. The title 'Barristers' is ably done by Mr. H. C. A. Bingley (Secretary to the General Council of the Bar) and Mr. J. R. V. Marchant. There is a preliminary note to this treatise calling attention to the fact that statements therein as to the practice and the rules and regulations of the profession are 'statements of matters of etiquette only, and are not rules of law or binding as such.' The article does nevertheless contain many statements which are statements of law, e. g. those with reference to counsel's authority to bind his client.

Sir Albert de Rutzen (Chief Magistrate of the Metropolis) and Mr. A. W. Baker Welford are responsible for the treatise on Bastardy. The subject of legitimacy is an interesting one, and is dealt with in a most able manner. The article concludes with a statement of the practice in affiliation proceedings.

The article on Bills of Exchange and other Negotiable Instruments is by Mr. Kenneth E. Chalmers, and revised by Sir Mackenzie Dalzell Chalmers (late Permanent Under-Secretary to the Home Office), whose previous works on the law as to negotiable instruments are well known. The part of this treatise which relates to stamp duties is by Mr. F. Washington Kingdon (of the Inland Revenue Department), and his

name is a sufficient guarantee that his part of the treatise is correct. On the other hand, a Somerset House official is not to be expected to point out loopholes in the stamp laws which are interesting to the profession.

The second volume of the Laws of England is quite up to the standard of the first. F. E.

Civil Proceedings by and against the Crown. By GEORGE STUART ROBERTSON. London: Stevens & Sons, Lim. 1908. La. 8vo. cxxx and 933 pp. (£1 18*s.*)

IN writing a work on Crown Practice in Civil Suits, the author has rendered a great service to those members of the legal profession who have occasion to engage in litigation for or against the Crown. Until the present work appeared, it may safely be said that no legal subject possessing a recognized and defined existence was so difficult to investigate as these suits. The older textbooks on the subject, Manning (1826), Fowler (1827), and Chitty (1820), have been long out of date. The Crown Suits Act 1865, and many kindred statutes, as well as the Chancery Consolidated Orders 1860, the Exchequer Rules 1860–6, and some of the present Supreme Court Rules, have effected great changes; and these, together with the creation of several fresh departments of government, have made the present work a much needed and welcome addition to the law library. Cause of Action, venue, rules and mode of pleading, costs, &c., all present singularities and obscurities which have hitherto plunged the legal practitioner into doubt and confusion. The present work goes far to simplify and elucidate all such matters, dealing with the whole subject in a comprehensive and convenient manner, as a practical guide to the law upon the subject as it exists at the present day.

Mr. Robertson's book shows up the many pitfalls and obstacles which the present law places in the path of persons who may become involved in litigation with the Crown. The Crown is indeed as well shielded as it could be by a stringent code of *droit administratif*, with this difference, that in a country like France, where the latter exists, lawyers can ascertain the exact rights and privileges of the State, whilst in England, under the present system, the immunities of the Crown have to be discovered at the hazard of expensive litigation.

It is not encouraging to litigate with the Crown in proceedings at law upon a question of principle or a matter of small financial value, when the Crown is not bound to pay costs if the subject wins (*L. A.* v. *Hamilton* (1852) 1 Macq. 46, 55). In equity the rule is not completely applicable (*A. G.* v. *Earl of Ashburnham* (1823) 1 Sim & S. 394, 397). Where, too, the Crown proceeds against a subject the latter cannot counterclaim as of right, but must proceed separately by Petition of Right, and a similar disability also occurs under the Admiralty Suits Act 1866 (see *Yeoman* v. *Yeoman* [1904] 2 K. B. 429). These privileges of the Crown have been modified here and there by statute, or as matter of grace by the Crown itself. In tracing all these changes Mr. Robertson's work will be of the greatest service to practitioners.

Not the least useful is the information given *passim* as to the gratuitous ameliorative concessions which the Crown frequently makes to litigants, and which the author has probably learned from personal experience.

The position of those bodies which possess a public or quasi-public character, and are sometimes said not to be purely Crown bodies, is dis-

cussed by the author, who differs from the views of the judges expressed in such cases as *In re Woods Estate, Ex parte Commissioners of Works and Buildings* (1886) 31 Ch. D. 607, and *Graham* v. *His Majesty's Commissioners of Public Works and Buildings* [1901] 2 K. B. 781, as to the liability of such bodies to be sued by the ordinary procedure and to pay costs. Mr. Robertson does not agree that these bodies are agents of the Crown with a separate corporate existence, but holds that they are Crown servants simply, and, as such, entitled to all the Crown prerogatives, save where the latter are expressly limited by statute.

The learned author expresses his opinion freely upon doubtful points, and it cannot be said that he shows undue partiality towards the Crown in so doing. His opinions are obviously free from bias, whether they all meet with acceptance or not. The following subjects are dealt with in the book. *Part I*, the capacity of the Crown and the various Departments of State to sue and be sued. *Part II*, which is the most characteristic section, deals with the recovery of Crown debts, and the procedure at Law or in Equity on the Revenue side of the King's Bench Division. These remedies are the peculiar privilege of the Crown. Whether, in explaining the procedure by English Information, the alphabetical arrangement is the best mode of simplifying the subject, or whether the subject might not have been more advantageously treated in natural sequence, following the procedure through step by step, may perhaps be open to doubt. However that may be, the information is all given in a very lucid style, and can be readily followed. *Part III* deals with Petitions of Right and contains a variety of useful precedents. The learned author holds, in company with Mr. Clode (see Clode's Petition of Right, p. 165), that a subject is not absolutely entitled to a fiat for his Petition of Right even where he has a good contractual claim, but considers that it may be refused at the will of the Sovereign. The judicial authorities upon this question show some divergence of opinion. See *In re Nathan* (1884) 12 Q. B. D. 461, per Bowen L. J.; and *Tobin* v. *R.* (1863) 14 C. B. N. S., per Erle C. J. at p. 221. It is more than doubtful, however, whether such a thing as the caprice of the Sovereign has any place in the laws of our constitution. The rule that the King can do no wrong, referred to by the learned author, means only that the King is personally immune from all process of law. Certainly the Crown is bound by many Acts of Parliament which it would be a legal wrong to disobey. But, as there is no remedy for a breach by the Sovereign of a statute, so there may be and probably is no known legal remedy for a capricious refusal on the part of the Crown to issue a fiat for a Petition of Right in a suitable case. A political one against the Crown's advisers there must be, and it seems that the responsible officer is the Attorney-General (per Bowen L. J. 12 Q. B. D. at p. 479).

Part IV deals with Escheat and sets out the mode of procedure on Inquisition and Traverse. *Part V* relates to litigious proceedings in which the Crown takes part either as *parens patriae* or in other similar capacities arising out of the various *status* of the Sovereign as Head of his realm and people.

Part VI is exceedingly useful. It deals with the various singularities of practice and procedure wherein the Crown is treated differently from the subject, and bears reference both to proceedings by English and Latin Information and to proceedings under the ordinary jurisdiction of the Courts.

Part VII expounds the principles concerning the immunity of the Sovereign and the liability of Crown servants. W. W. L.

A Practical Exposition of the Principles of Equity, illustrated by the leading decisions thereon. By H. Arthur Smith. Fourth Edition. London: Stevens & Sons, Lim. 1908. La. 8vo. lxvii and 871 pp. (21*s.*)

In a book intended, primarily at any rate, for students false doctrine should be avoided, so far as is possible, for early impressions are notoriously the most firmly fixed; yet here nearly two pages are devoted to the subject of unilateral mistake, and the conclusion is that unilateral mistake gives a right to relief. We should have thought that that heresy had been finally eradicated by the decision of Farwell J. in *May* v. *Platt* [1900] 1 Ch. 616. Unilateral mistake may be set up in answer to a claim for specific performance, but specific performance is an extraordinary remedy—*Scott* v. *Alvarez* [1895] 2 Ch. 603—and many topics are there admissible by way of defence which could not be raised in another form of procedure. *Paget* v. *Marshall* (1884) 28 Ch. D. 255, cited on p. 228 with the qualification of 'but see *May* v. *Platt* [1900] 1 Ch. 616; 69 L.J. Ch. 357', was a case of fraud, as we learn from the latter case. Again *Van Praagh* v. *Everidge* [1903] 1 Ch. 434 was decided on the Statute of Frauds, and illustrates, further, the different principle that there must be in every contract a *consensus ad idem*. Again on pp. 54 and 55 we read, 'In order to effect a gift of lands, it is necessary that the transfer should be effected by deed. A feoffment (unless made under a custom by an infant) is void without this evidence.' We do not think we are doing any injustice to the learned author in asserting that the passage quoted can only be construed as involving the position that an infant may make a valid gift (in the ordinary sense of gratuitous conveyance) of lands by feoffment, and it is clear that he cannot do this: *In re Maskell and Goldfinch's Contract* [1895] 2 Ch. 525. Then in the next passage, 'As to a gift of chattels, the best opinion seems to be that it must either be perfected by delivery of possession or evidenced by deed.' For this *Irons* v. *Smallpiece* (1819) 2 B. & Ald. 551, 21 R.R. 395 is cited. Surely the question has ceased to be a controverted one since the decision of the Court of Appeal in *Cochrane* v. *Moore* (1890) 25 Q. B. D. 57, which confirmed *Irons* v. *Smallpiece*. Then again on p. 706, 'It may be added, that the tendency of modern decisions is to bind parties more strictly to the terms of their agreements,' that is with regard to time being of the essence of the contract in equity. *Cornwall* v. *Henson* [1900] 2 Ch. 298 in the Court of Appeal, and *Bruner* v. *Moore* [1904] 1 Ch. 305, we should think, distinctly negative any such conclusion. We cannot find any reference to either of these cases.

Turning to another matter, we cannot express much admiration of the author's method of introducing the topic of the equity of redemption. Lord Eldon, it is true, accepted, somewhat incautiously as it seems to us, the suggestion made at the bar that the right to redeem rested upon the equitable rule that time was not of the essence of the contract—see *Seton* v. *Slade* (1802) 7 Ves. 265; 6 R. R. 124; 2 Wh. & T. L. C. Eq. 475; but this, it seems to us, is not the true principle. In the first place, it is doubtful whether the rule ever applied to any other contracts than those relating to land—see *Reuter* v. *Sala* (1879) 4 C. P. D. 239—and it cannot be disputed that there was an equity of redemption in a mortgage of chattels. In the next place, time might by the terms of the contract be made essential in the case of a sale of land, but the right to redeem could not be fettered in any way, although it could be destroyed

by a subsequent sale—an equity of redemption was an equitable estate, *Casborne* v. *Scarfe* (1737) Atk. 603; 2 Wh. & T. L. C. Eq. 6—to the mortgagee, between whom and the mortgagor no fiduciary relation existed. The safer ground, it seems to us, upon which to rest this branch of the law is the relief granted in cases of forfeiture where money afforded an adequate compensation, *Peachy* v. *Duke of Somerset* (1724) 1 Stra. 447; 2 Wh. & T. L. C. Eq. 250; *Sloman* v. *Walter* (1784) 1 Bro. C. C. 418; 2 Wh. & T. L. C. Eq. 257. While on this topic, we must express our astonishment that, what seems to us a typical student's case, namely, *Powell* v. *Brodhurst* [1901] 2 Ch. 160, should have been omitted. In one or two instances we think that the notes are unnecessarily overburdened with cases.

We think we have by the above instances, taken at random by way of illustration, justified our refusal to award unqualified praise. As a class textbook, when the errors can be pointed out by the teacher, it will be found more useful than in the hands of the student who has not that safeguard. On the whole, however, the good predominates.

A. E. R.

Roscoe's Digest of the Law of Evidence in Criminal Cases. By HERMAN COHEN. Thirteenth Edition. London: Stevens & Son, Lim., and Sweet & Maxwell, Lim. 1908. 8vo. lxviii and 937 pp. (£1 11*s.* 6*d.*)

A BOOK that has run the gauntlet of professional criticism for over seventy years, and passed successfully through twelve editions, does not seem to offer much scope for an editor's skill. Nevertheless Mr. Cohen has managed to put into the latest issue of this indispensable volume a very considerable amount of able and judicious work. In addition to introductory notes upon the Definition and Classification of Crime, he has, in the text, supplied several new subject sections, added, with rare exceptions, every important case decided since the last revision, and appended the dates, wherever discoverable, to all the cases quoted. He has also furnished an immense number of helpful cross-references throughout the text. To have succeeded, in spite of all this, in reducing the bulk of the work by some sixty pages, constitutes something of a feat. Doubtless some portion of this reduction is due to two innovations with which the average legal reader will probably quarrel, viz. the suppression of the letters 'R. *v.*' in the title of all criminal cases, and the abbreviation of the familiar but long-drawn '6 & 7 Will. IV c. 65 s. 9' into the hurried economy of '6-7 W. 4, 65, 9'. Still, with fresh cases and statutes ever on the increase, there is undoubtedly something to be said for these compressions.

Mr. Cohen has apparently bestowed especial pains upon Part I of the book, which deals with the rules of evidence generally, and which, owing to recent statutory and other changes, has necessitated the largest amount of revision. In this section, the Criminal Evidence Act of 1898, which only became law while the previous edition was passing through the press, is now incorporated in the text and treated, so far as we have been able to test, very clearly and accurately. The conflict of judicial decision as to the compellability of a wife as a witness against her husband on charges of abduction under 48 & 49 Vict. c. 69. s. 7, is, in particular, duly noticed (p. 227), although Mr. Cohen abstains from giving his own opinion upon the point. This question is of more importance than might

appear, since the same difficulty is likely to arise with respect to each of the other enactments referred to in the Schedule to the Criminal Evidence Act, 1898. The various exceptions to the hearsay rule have also been subjected to careful revision, though the introductory proposition that 'where there is a presumption that hearsay evidence is true, it is admissible' (p. 23), conveys rather a counsel of perfection than a statement of actual law. The admissibility of complaints in cases of rape, which though treated under the general head of hearsay, Mr. Cohen properly discriminates from it, has received much discussion of late, the effect of which is well summarized on pp. 23–4. With regard, however, to complaints in cases other than rape, we question whether *R.* v. *Wink* and *R.* v. *Ridsdale*, where such evidence was allowed to be given on charges of robbery and shooting, respectively, should be retained as law. The better opinion certainly seems to be that the admissibility of complaints is now confined exclusively to charges of rape and related offences upon women and girls (*R.* v. *Osborne* [1905] 1 K. B. 551, 558–9; *Beatty* v. *Cullingworth*, 60 J. P. 740 *affd.* C. A. *The Times*, January 14, 1897). The statement (p. 36) that '*prima facie*, as a matter of course, a confession by the prisoner is admissible as evidence against him; but there are certain grounds which may be shown by him sufficient to exclude the confession', requires modification. This no doubt was the old rule, but it is now well settled that it lies upon the prosecution to establish, and not upon the prisoner to negative, the voluntariness of a confession (*R.* v. *Thompson* [1893] 2 Q. B. 12; *R.* v. *Rose*, 18 Cox, 717). We notice (pp. 103–4) that Mr. Cohen doubts the decision of Lush J. in *R.* v. *Webb*, 11 Cox, 133, that a witness under sentence of death is incompetent. This doubt is probably correct: at all events, it is confirmed by a ruling of Harrison J. in the unreported case of *R.* v. *Fitzgerald*, referred to in Taylor on Evidence, § 1347 *note*, where *R.* v. *Webb*, though cited, was not followed. During the ten years' interval since the last edition a very considerable mass of cases has necessarily accumulated for inclusion, but, after a fairly exhaustive search, the only ones which we fail to find are *R.* v. *Whitmarsh*, 62 J. P. 680, 711, *R.* v. *Smith*, 65 *id.* 426, *R.* v. *Abbott*, 67 *id.* 151, and *R.* v. *Cowle*, 71 *id.* 152, relating to the subject of dying declarations. Altogether, indeed, Mr. Cohen is much to be congratulated on the success of his task.

S. L. P.

Richard Hildebrand, Recht und Sitte auf den primitiveren wirtschaftlichen Kulturstufen. Jena: Gustav Fisher. 8vo. 189 pp.

Professor Hildebrand, of the University of Gratz, has issued a second edition of a book which produced some sensation on its first appearance in 1896. The author attempts to bring order into the rather disparate material of early legal custom by co-ordinating it on the lines of economic development. 'I have tried,' he says, 'to determine the origin, the evolutionary sequence and the connection between legal institutions and customs obtaining with different nations and at different times from the standpoint that the growth of economic culture is the same or proceeds according to a certain common type in its essential features in the history of all nations.' Dargun had made a similar attempt a few years earlier, and the idea that the varieties of legal development can be classified and to a certain extent explained by considerations drawn from the main types of husbandry is certainly worthy of consideration. It is much more doubtful whether it can be assumed that one typical line of

development can be traced in this respect. Apart from such very broad stages as those marked by hunting and fishing, nomad life and agriculture, it would be difficult to trace an established continuity, and within these broad classes there are a great many varieties, dependent on climate, national psychology, and political circumstances. To mention just one point, it is clear that the development of the law of property and of personal condition will be entirely different within the broad class of tribes passing from the nomad stage to the agricultural, according as the tribe in question leads a more or less separate existence or conquers other tribes. Of such disturbing or rather differentiating conditions a great many have to be noticed in the history of primitive humanity.

As for the results of Dr. Hildebrand's investigations, his book, though undoubtedly containing many ingenious and valuable suggestions, hardly does justice to the magnitude and complexity of the task. The author himself owns that sections 1 and 2, dealing with hunters, fishers, and pastoral peoples, as well as section 4, discussing the rise of property and land, are more in the nature of illustrations of principles than of a comprehensive discussion of them. And indeed, though we may sometimes sympathize with the author when he contradicts dogmatic assertions on the evolution of marriage, matriarchy, private and communal property, it would be difficult to regard his own observations on the subject as more than casual remarks. Nor is it necessary to go very deeply into the question of the elements of communalism and individualism in mediaeval husbandry and law in order to see that its treatment on pages 134–89 is very slight, and not redeemed by the flippant way in which the writer assails any one with whom he happens to disagree.

Professor Hildebrand points to section 3 as the *pièce de résistance* of his book. It deals with Caesar's and Tacitus' accounts of the early husbandry of German tribes. The main idea of this section consists in the view that the Germans of that time were just passing from the stage of hunting to that of primitive agriculture, and that the use of arable is characterized by the shifting occupation of roughly cleared ground. Under these conditions there can be no talk either of communal or private property, but only of certain modes of assigning and protecting possession. In so far as Professor Hildebrand's theory goes further than the well-known and usually received generalizations of Hansen in regard to 'wilde Feldgras-wirtschaft,' it seems somewhat one-sided and exaggerated. To begin with, apart from a rather unhappy attempt to read into Caesar, B. G. vi. 23 a statement as to complete absence of political organization of the Teutonic tribes (pp. 68, 69, 73), the analysis of Caesar's report is vitiated by disregarding the features of artificial military organization which are written large on the face of it. One of two things, either Caesar did not know what he was talking about, and in this case it is not much use squeezing definite pronouncements out of some of his words while rejecting other parts of his account, or else, as seems to be the better opinion, we ought to take account of the military aims and organization of the Suevic 'thousands,' described by him in the fourth book. How far this peculiar description holds good for other German tribes is a different and a difficult question, but it ought not to prevent us from noticing the definite information supplied in regard to the Suevic league, which was best known to Caesar and in closest proximity to the Roman border.

Professor Hildebrand's commentary on Tacitus' *Germania* culminates in an interesting conjecture in regard to the famous c. 26: 'vicinis' is suggested

instead of 'in vices.' The author contends that economic and legal conditions were still governed at that time by processes of the clearing of waste and of casual occupation. Here again everything seems too much on one plane. E. g. the idea that while there is profusion of land there can be no competition as to land cannot be accepted without considerable reservations. We need not refer our readers to the history of rent as sketched by Ricardo and modified by Carey in order to let them realize that there may be land in abundance and yet pressure on some plots particularly attractive in one or the other respect—on account of exceptional fertility, the proximity of a river, &c. Indeed, it is quite inconceivable that the whole state of economic affairs on the right bank of the Rhine after the firm establishment of the Roman frontier should have been characterized by constant forest fires and casual occupation of arable. The climate and soil of the country were not suited to that kind of life, and Tacitus himself draws distinctions in this respect between the nomad Sarmatians and the tribes of Germany. Thus we are led to admit that Tacitus' description points to the beginnings of permanent agrarian arrangements and not merely to practices of occupation, although, of course, there can be no question of using the term 'property,' in the rigid and highly developed Roman sense. P. VINOGRADOFF.

Max Rintelen, Schuldhaft und Einlager im Vollstreckungsverfahren des altniederländischen und sächsischen Rechtes. Leipzig: Duncker und Humblot. 8vo. xvi and 237 pp.

THIS is an investigation by a pupil of Professor H. Brunner in Berlin. It traces two interesting forms connected with the procedure for the recovery of debts—the imprisonment of the debtor and the arrest of debtors and sureties (Einlager). The material used has been drawn from the domain of Frankish custom as applied in the Netherlands and from that of the Saxon provinces. The sources studied fall within the epoch preceding the reception of Roman law. A curious contrast is discovered in the use of imprisonment for debt between Frankish and Scandinavian law: the first considers it as a consequence of the refusal of the defendant to satisfy a legal claim—to pay a fine or to acquit a debt. Through his inability or unwillingness to satisfy such a claim the defendant commits a denial of right and becomes eventually an outlaw. It is at this stage that he can be subjected to revenge or personal constraint. The Scandinavian procedure, as analysed by Amira in his Nordgermanisches Obligationenrecht, starts from an entirely different view: the insolvent debtor as well as the man who is not able to pay off a fine is given over into temporary servitude to the plaintiff and works off the amount of his outstanding material obligation. Comparisons with the Old English *wite-theow,* the Old Russian *Kholop obelny,* suggest themselves, and similar practices may be traced back into Greek antiquity in connexion with the Apollo and Admetus myth and the so-called *κατακείμενος* of Greek law. The recovery of debts according to Saxon custom is shown to comprise both views: rural life fostering the practice of servitude in compensation, while in towns imprisonment as an indirect means to bring pressure on debtors naturally develops.

The arrest known as Einlager was a quaint custom of forcing a person liable to pay a debt to stay for some time at an inn or in a private house until the amount be recovered: it was primarily employed against

sureties, and followed in Frankish custom as a matter of course, apart from any contractual clause to this effect. Sometimes it was used also in the case of the principal debtors themselves, but in its original meaning it developed out of the taking of hostages. The surety subjected to Einlager was a *hostage*, who by the delivery of a small sum, an 'old groat,' could free himself, but only in order to proceed by execution against the debtor himself. The collection of passages from documents of customary law supplied by Mr. Rintelen is very full, and their analytical discussion is carried out in a thoroughly satisfactory manner. P. V.

Collective Ownership. By C. T. Carr. (Yorke Prize Essay, 1905.) Cambridge University Press. 1907. 8vo. xix and 180 pp. (5*s.* net.)

We venture to think that this book contains one of the best expositions in existence of the portion of the law of which it treats. The authorities have been mastered and assimilated, and the author has a thorough knowledge of the history and theory of the subject. The result is a readable and well arranged, and at the same time critical, account of the law, which ought to be quite as useful to the practical lawyer as to the theoretical jurist. Altogether it is a worthy addition to the series of Yorke Prize Essays.

The most obvious and useful forms of collective ownership, viz., by corporations or by means of the Trust, were excluded from the subject set for the essay, and the author consequently deals with the other possible forms of such ownership. The first chapter on man and wife is a very interesting one. The title rules out the marriage settlement as arising by means of the Trust, and therefore the relations as determined by Common Law only can be discussed. The English law which, until altered by statute, gave the fullest possession of the wife's lands and goods to the husband is compared with the *communio bonorum* of France and with Scots law. The peculiarity of our Common Law in denying the collective ownership of the chattels of man and wife is illustrated by Maitland's illuminating suggestion that as the ecclesiastical courts assumed control of the succession to movables, the Common Law could only deal with them during the subsistence of the marriage and therefore gave absolute power to the husband. The theories of Stobbe as to the ownership of husband and wife are stated and criticized in detail—a very interesting piece of analysis which to the best of our knowledge can be found in no other English law book. Another good portion of the same chapter is the discussion of the cases on the rule that 'a gift to a man and his wife and to a third person, is to be construed as a gift of a moiety to the husband and wife and a moiety to the third person.' The author may well speak of the 'nice application of the rule.' The spectacle of the courts struggling with a principle which is a logically correct deduction from the premiss that 'husband and wife are, for most purposes, one person,' and which could not therefore be directly abrogated, is an amusing one. The injustice of the rule under modern conditions seems to be felt throughout the cases, and every straw that could indicate an intention, or could possibly be construed into an indication of an intention, that each should take separately is eagerly clutched at. A further breach both in the premiss and in the deduction has been made by the Married Woman's Property Acts, and the whole subject of this position of the 'spoilt child of the law' needs reconsideration and amendment if the law

is to be made a coherent whole; for at present it is a sad jumble of ancient rules and modern piecemeal attempts to remedy some of their practical inconveniences.

The succeeding chapters of the essay deal with Co-heirs, Joint Tenants, Tenants in Common, and Partners; all containing, as far as we have been able to test them, a good and complete account of the law. The rights and remedies of all classes of co-owners *inter se* are described in a separate chapter, and nothing could more clearly bring out the apparent disfavour with which the law regards all the forms of co-ownership, except partnership. The pressing necessities of commerce have forced the courts (mostly courts of equity) to provide or to recognize a long series of rules for regulating the mutual relations of partners, but co-owners of other descriptions are in a far less favourable position. The Common Law remedies of an aggrieved co-owner are cumbrous and often ludicrously ineffective, even in the cases where they exist at all, and the statutory rights that have been added to them lie chiefly in the direction of forcing a severance or sale; that is to say, they destroy collective ownership and convert it into several ownership. The chief exception, again *pro beneficio commercii*, is in the case of ships.

The volume ends with a very instructive chapter on communities (other than corporations) as owners. It is largely historical, and the chief complaint that we have to make about it is that it is too short. We hope that the author may see his way in the future to give us a more detailed study of the same subject, with which he is eminently qualified to deal. H. J. R.

A Treatise on the Law of Easements. By C. J. Gale. Eighth Edition, by R. Roope Reeve. London: Sweet & Maxwell, Lim. 1908. 8vo. xxvii and 660 pp. (25*s.*)

The position of an editor of a new edition of a standard textbook is not an easy one. He is anxious as far as possible to leave the original text intact, but in so doing he is likely to leave the older cases set out at some length while more recent and more important cases are only shortly referred to or noted in a footnote. Mr. Roope Reeve, the editor of the eighth edition of Gale on Easements, has done his work excellently, but perhaps with too great a respect for the original text. Thus on the difficult subject of the alteration of easements by encroachment, eight pages are devoted to rather full statements of the earlier cases, two pages of Mr. Gale's comment and views follow, and then at last the reader comes to *Tapling* v. *Jones*, which decided that Mr. Gale's views were erroneous. But it is better to err on the side of conservatism; a new edition is a different thing from a new book.

Since the publication of the seventh edition there have been two cases of great importance: *Colls* v. *Home and Colonial Stores* and *Hyman* v. *Van den Bergh*. The first of these has necessitated the rewriting of the chapter on light. The latter was decided so shortly before the appearance of the eighth edition that, although it is duly noted wherever it should be, the whole effect of it is not considered so fully as perhaps might be desirable. These two cases illustrate the two different ways in which the Prescription Act has been construed. In *Hyman* v. *Van den Bergh* the Act was construed strictly; the words were taken in their literal meaning, so that a right to light under the Act cannot be obtained without litigation. In *Colls* v. *Home and Colonial Stores* the words

'or that the right thereto' (namely the access and use of light to the building) 'shall be deemed absolute and indefeasible' were not construed strictly, but taken to mean the right to so much light as is sufficient for the reasonable enjoyment of the building. *Hyman* v. *Van den Bergh* raises the question as to the way in which a claim to rights of light should be pleaded. It seems to be necessary now to plead not only under the Statute but also to plead a lost grant and enjoyment for time immemorial. This, however, is a question which requires full discussion, especially in view of some of the observations of Farwell L. J. in *Hyman* v. *Van den Bergh*.

The decision in *Colls* v. *Home and Colonial Stores* raises the question, which is ably discussed by Mr. Roope Reeve, whether in deciding that the obstruction amounts to a nuisance the amount of light left to a plaintiff is to be taken into consideration. It seems clear that in considering the amount left regard should only be had to that light to which an indefeasible right has been acquired, that is to say, that light to which the plaintiff has already established his right by an action, and no other light, however long it has been enjoyed, should be taken into consideration.

In view of the decision in *Re Nisbet and Pott's Contract*, in which the Court of Appeal have adopted Jessel M.R.'s view that restrictive covenants are in the nature of negative easements, it would be well that the whole question of restrictive covenants should be discussed in a future edition. The analogy, though close, is in some respects not perfect, and there does not appear to have been any case in which a right to the benefit of restrictive covenants has been set up by prescription or lost grant. Another point which might usefully have been discussed is whether a right of way for horse carriages includes a right for motor vehicles. An argument might be founded on *Ballard* v. *Dyson* that it did not; and the question is interesting and important at the present time. It is remarkable that so many questions connected with the law of easements still remain undecided; the careful way in which doubtful points are discussed has given Gale on Easements its position as the standard work on the subject, and the eighth edition fully maintains the high standard of excellence set by the earlier editions.

The Practice on the Crown Side of the King's Bench Division of His Majesty's High Court of Justice. By F. H. Short and F. H. Mellor, K.C. Second Edition. London: Stevens & Haynes. Law. 8vo. 1 and 730 pp. (30*s*.)

The second edition of this valuable book is marked by a change of *format* and a complete rearrangement of the contents. The bulk of it now appears in the form of a commentary on the new Crown Office Rules of 1906, the substitution of which for the old Rules rendered a new edition of the work necessary. We do not feel altogether sure that this arrangement is preferable to the old one, but the authors, with their experience of the subject, must have been convinced that it was, or they would not have set themselves the task of recasting, which must have involved very great labour. Continuous dissertations on the principal subjects, such as Mandamus, Certiorari, Prohibition, Attachment, &c., are however retained, in addition to the notes to the rules affecting those subjects, and these notes, it should be observed, sweep into this book Mr. Short's separate and older work on the Crown Office Rules.

The task of revision and rearrangement seems in the main, so far as we have tested it, to have been very well done and to have brought the book thoroughly up to date. The statement, however, as to mandamus to Government Departments is not quite clear. It is stated, first of all, that no mandamus will lie to the Lords of the Admiralty, the Secretary of State for War, or the Commissioners of Customs, and then it is stated, quite correctly, that where there is a statutory duty cast upon servants of the Crown to do a ministerial act, mandamus will issue in respect of it. It would lie under such circumstances to the above-named servants of the Crown just as much as to any others. *Pro tanto* the general objection which the Crown is in the habit of taking when a mandamus is sought against a Government Department is unfounded, and it is almost time that the bubble was pricked. Some other matters appear to be too scantily treated, e.g. the question of Crown costs (p. 389), and the right of the Crown to a trial at bar, and the method of applying for it (p. 298). On the last-cited page, note (1), there is a statement about *R.* v. *Lynch*, which is not quite clearly consistent with that in note (5) on p. 297. *West Rand Central Gold Mining Co.* v. *R.* [1905] 2 K. B. 391, should have been added as the most recent instance of a trial at bar, though the fact is not mentioned in the report.

R. v. *Douglas* (p. 250) is reported in 2 Dowl. (N.S.) 416, and the case and this reference should be added to the Table of Cases.

One minor portion of the book seems not to have been so carefully edited as the rest, namely the section on Inquisitions (pp. 392–7). As to the power of the Court to quash inquisitions of escheat, *Ex parte Lord Gwydir* (4 Madd. 281, 313) is contrary to the dictum on which the statement in the text is based, and which appears to us to be clearly wrong. A petition for leave to traverse appears to be still necessary, as no rules for traverse have been made and s. 3 (3) of the Escheat (Procedure) Act, 1887, preserves the existing practice. This should have been noticed also on p. 394, where a doubt is expressed as to the practice. A petition was in fact lodged in the last contested case, *R.* v. *Manning*. 'Petty Bag Office Amendment Act, 1849' (p. 393) should be Petty Bag Act, 1849. The statement as to the right of parties interested to traverse lunacy inquisitions (p. 395) is too wide, and a good many more authorities should be cited to qualify it. It would appear that the Crown can have a *melius inquirendum* in lunacy (*Ex parte Roberts*, 3 Atk. 5, 6, which is not cited). It is correctly stated that the traverser is a defendant, though other authorities might have been added to support this, and it should be added that a result of this is that the Crown may be ordered to pay or receive costs under the Crown Suits Act, 1855.

The Law and Practice in Bankruptcy. By the Right Hon. Sir ROLAND L. VAUGHAN WILLIAMS. Ninth Edition. By E. W. HANSELL, assisted by A. ROMER MACHLIN. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1908. La. 8vo. cvii and 933 pp. (30*s.*)

WHEN reviewing the eighth edition of this work we wrote: 'There are few textbooks, if any, that we have found in practice more trustworthy and complete than this, and we have every reason to think that the confidence we have reposed in previous editions will not be betrayed by this.' During the last four years we have had the eighth edition in constant use and have never found it wanting; and a perusal of portions

of the new edition satisfies us that our confidence will again not be betrayed. In preparing this edition Mr. Hansell appears to have used all the diligence and skill in handling new material which he displayed in editing the earlier editions, and he has been assisted in his labours by Mr. A. Romer Macklin.

One of the most interesting of the many cases in bankruptcy that have been decided since 1904 is *re Button, ex parte Haviside* [1907] 2 K.B. 180, in which the Court of Appeal decided that where an art dealer had in his possession at the date of his bankruptcy goods which had been entrusted to him by a customer to sell for the customer, and by an order made in the bankruptcy it was adjudged that these goods passed to the trustee as being in the order and disposition of the bankrupt within the reputed ownership clause, the customer was entitled to prove in the bankruptcy for the value of the goods. The Master of the Rolls and Vaughan Williams L.J. supported their decision on the authority of *Exall* v. *Partridge* (8 T. R. 308) and *Edmunds* v. *Wallingford* (14 Q. B. D. 811), the principle of which cases is that where a person's goods are lawfully seized for another's debt the owner of the goods is entitled to redeem and be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor. This is one of the well-known instances of implied contracts where the law implies a promise to pay, though, in fact, there is none. The extension of this principle to the case of the goods of *A* vesting in a trustee in bankruptcy to pay *B*'s debts (that is, in effect being lawfully seized to pay *B*'s debts) is perfectly sound, and we certainly prefer to rest the decision on this basis rather than on that upon which Buckley L.J. inclined to rely, namely, that there was in the bankruptcy proceedings a breach of a contract of bailment by reason of the bankrupt's suffering an act which prevented him from performing his contract. It is rather straining the idea of a breach of contract to speak of a man's becoming unable to perform a contract by reason of his bankruptcy as in itself a breach of contract. Before the bankruptcy there had been no breach of contract by the bankrupt by parting with the goods, or refusing to return them, or by repudiation. The breach, if any, was the vesting of the property in the trustee by the bankruptcy.

The Law relating to Income Tax. By ARTHUR ROBINSON. Second Edition. London: Stevens & Sons, Lim. La. 8vo. lvi and 543 pp. (25*s.*)

MR. ROBINSON'S work is in the nature of an annotated code. The sections of the numerous acts dealing with income tax are printed in full, and are arranged in the order in which they would naturally appear in a well-drawn consolidation Act. This is a good, and indeed the only practicable, way of dealing with such an intricate subject as that of the income tax. The notes of the various sections are little more than digests of the decisions upon them, the facts of each case and the decision being clearly and shortly stated, whilst the cases are grouped in appropriate classes with prominent catchwords, and the cases in each group are arranged in order of date. The result is an ideal book of reference, which enables the practitioner to find the authorities he wants with the minimum of trouble. The author does not attempt to comment

upon the statutes or to deduce general propositions from the cases. Here and there a few words of comment might with advantage have been added, as, for instance, to explain that s. 34 (1) of the Finance Act, 1894 is in effect repealed by s. 19 (8) of the Finance Act, 1907, s. 8 of the Finance Act, 1898 having taken the place of the former. These sections are set out one after the other without explanation or comment.

Though the text of this edition has been carefully brought up to date, but little alteration seems to have been made in the introduction, which contains a general summary of the law. The alterations in the law have been inserted rather clumsily, often in parentheses, and the statistical information as to the amount of income assessed under the various schedules and so forth is given as for the year 1883–4. Some more recent statistics might with advantage have been either added or substituted. However, as probably few readers of the book will trouble themselves to read the introduction, this is not a very important matter, and does little to detract from the value of a really excellent book on a subject on which good books are scarce.

The Law of Nuisances. By EDMUND GARRETT and HENRY G. GARRETT. Third Edition. London: Butterworth & Co. 1908. xliii and 712 pp. (21*s.* net.)

THE judgment passed on this work must differ very considerably as it is regarded, as a scientific and literary study of a branch of law, or as a practitioner's handbook made useful by a fairly comprehensive index. In the latter class it must be held a useful collection of the cases, statutes, and topics in daily use in practice. Indeed the Appendix of Statutes and the eminently useful notes suggest that it has been the companion on the bench of the learned magistrate who has compiled it, and who has set down the results of cases argued before him, and the citations there used. The work in this light is of value and has been, on the whole, well done.

As a scientific study of the principles at the root of that subdivision of law which deals with nuisance, a very different principle of valuation must be adopted. Occasionally the method of treatment rises to considerable merit even under this classification, as in the enunciation of the four propositions at p. 138 which received the approbation of the Lord Chief Justice in *West* v. *Bristol Tramways Co. Ltd.*, 24 Times L. R. 478, and also earned a high tribute from Kekewich J. in *National Telephone Co.* v. *Baker* [1893] 2 Ch. 199; but more often, e. g. pp. 175–7, the plan adopted is a mere simple enumeration of cases in the manner of the old text-books, without any very manifest co-ordinating principle. The style is awkward and cumbrous. Chapter xiii treats of Procedure; on which subject to be of any great use the strictest accuracy must be observed. A statement that an action in respect of a nuisance may be brought 'where the damages claimed do not exceed £50 in the County Court' is not a very hopeful set off in the first sentence thereon. As there is no Table of Statutes we are not able certainly to affirm that 3 Edw. VII. c. 42 is not mentioned; at any rate it is not mentioned in connexion with the passage cited, on which it has a very important bearing. There is an appendix of thirty-nine Acts of Parliament, or fragments of Acts of Parliament, e. g. the Towns Improvement Clauses Act, of which 30 secs. out of 214 secs. are cited, occupying from p. 441 to p. 712, and which if useful to the learned magistrate in his daily ministrations will probably

serve no other useful purpose save by reason of an occasional find in the way of a note, with very practical bearings. The care that might have been looked for in revision has not been exercised; since we find, for example, *Bowers* v. *Peate* in the margin at p. 158; *Tuberoil* v. *Stamp*, both in the index of cases and at p. 146; our old friend, one of the landmarks of the law, *Angus* v. *Dalton*, in the disguise of *Angus* v. *D'Alton* at pp. 154, 161, 248, and again in the index of cases; *Appleby* appears for *Applebee* v. *Percy* at pp. 187, 188; *Astlatt* v. *Southampton* for *Aslatt*, &c., at p. 306; both in text and margin and note *Bolinbroke* instead of *Bolingbroke* v. *Swindon Local Board* at p. 243; and, to give only one example and quite a trivial one of a frequent error, and one often pressed home against the late Mr. J. A. Froude, the departure from the *ipsissima verba* in what purports to be a verbal quotation of Blackburn J. from 'L. R. 1. H. L. C. at p. 112'. These are but samples of scores of errors that the most ordinary care would have extirpated; the scribes of the Year Books, indeed, paid no regard to such things, but modern readers of learned works expect accuracy even in trifles.

The Victorian Chancellors. By J. B. Atlay. In Two Volumes. Vol. II, with Portraits. London: Smith, Elder & Co. 1908. 8vo. i–vii + 1–465 pp.

Biography is one of the many things of which Hesiod's golden saying holds good, that 'the half is more than the whole,' and the truth is well illustrated in this new volume of Mr. Atlay's Victorian Chancellors. In some serener sphere we may have time to read the Memorials of Lord Selborne—in four big volumes—and, perhaps, Lord Brougham's Life and Letters. But life here is too short. In the meantime Mr. Atlay's brief biographies are excellent. There are ten of them—Lord St. Leonards, Lord Cranworth, Lord Chelmsford, Lord Campbell, Lord Westbury, Lord Cairns, Lord Hatherley, Lord Selborne, Lord Halsbury, and Lord Herschell—all extremely interesting, as the lives of men must be who by learning or eloquence, by pre-eminent ability or force of character, have won their way to such a position as the woolsack. In several cases, notably those of Lord Chelmsford and Lord St. Leonards, Mr. Atlay has had access to family papers and has gathered therefrom much new and acceptable information. We find, for instance, that it was by the merest accident that Lord Chelmsford did not spend his life as a sugar-planter in the West Indies. His father had an estate situate on the side of La Soufrière, then supposed to be an extinct volcano. On a sudden—April, 1812—the mountain burst into violent eruption, and when the visitation had passed, not a vestige of the paternal estate was to be seen. This catastrophe proved—paradoxically—the foundation of Lord Chelmsford's fortunes, aided by his personal charm and a pretty wit. Here is a specimen, which Mr. Atlay gives us, of the latter. In a town on the Home Circuit the High Sheriff for the year, though a young man, happened to be affected with a bulbous nose that 'flamed in the forehead of the morning sky.' Somebody in Thesiger's hearing remarked that it was nothing to the nasal organ by which the Sheriff's father had been distinguished. 'Ah! I see,' said Thesiger, 'damnosa hereditas.'

Of course we have the story of Lord St. Leonards' lost will; but Mr. Atlay gives us also—what is new—the explanation of the mystery. An inquisitive servant wanted to know what legacies Lord St. Leonards

had left to his domestics, and to find out he abstracted the will from the tin box in which it was kept in the dining-room. Before he could put it back the box was moved into Miss Sugden's bedroom—where it was inaccessible—and to avoid discovery the culprit thought it the safest course to destroy the will, little thinking that he was to enrich the law with a leading case!

There are new things too about Lord Cairns. We learn that Disraeli—who always spoke of Cairns as 'great in counsel'—used to send at the luncheon hour to Lincoln's Inn, when he was sitting there as Lord Justice, to get his opinion. We learn also that—however late the House of Commons might have sat—Cairns 'rose every morning at six o'clock to secure an hour and a half for the study'—not of his briefs, but—'of the Bible.' Yet with all his fine intellectual and moral qualities, Cairns remains a cold austere figure. The most interesting of the ten is Lord Campbell. His Lives have been stigmatized by a very able critic as 'among the most censurable publications in our literature'. Despite the critic, they possess a perennial charm. It is the same with Campbell himself. His contemporaries found plenty in him to dislike and disapprove, but his alertness of mind and his wide knowledge of affairs make him always good company. One of the performances of which he was most proud was his speech as counsel for Lord Melbourne, the Prime Minister, in the action of crim. con. brought against him by the husband of the Hon. Mrs. Norton—one of the beautiful daughters of the house of Sheridan. There was nothing in the charge—Lord Melbourne was old enough to be Mrs. Norton's father; but counsel for the plaintiff flourished some so-called incriminating letters as 'the most impassioned, the most tell-tale, the most damnatory.' They ran thus: 'I will call at about half-past four or five': 'How are you? I shall not be able to come to-day. I probably shall to-morrow': 'No House to-day. I will call after the levée, about four or half-past. If you wish it later, let me know. I will then explain about going to Vauxhall.—Yours, Melbourne.' Dickens was just then bringing out Pickwick. Here was his cue for the trial scene and Serjeant Buzfuz: 'Chops and tomato sauce! Heavens, gentlemen, is the happiness of a sensitive and confiding female to be trifled away with such shallow artifices as these?'

It is refreshing to hear from this volume that Lord Selborne was ploughed for 'Smalls'; and that Lord Westbury—*malleus clericorum*—had in him an element of extraordinary simplicity—what the Greeks call εὐήθεια.

Year Books of Edward II. Vol. IV, 3 & 4 Edward II, A.D. 1309-1311. Edited for the Selden Society by the late F. W. MAITLAND and G. J. TURNER. London: Quaritch. 1907 [in fact issued 1908]. 4to. xliv, 201 (double), 203–241 pp.

Year Books of the reign of King Edward the Third. Year XX (first part). Edited and translated by LUKE OWEN PIKE. [Rolls series.] London: 1908. La. 8vo. xlv and 632 pp.

TIME serves only for a brief notice of these publications. A portrait of Maitland and a few pages of biographical notice by Mr. B. F. Lock, the honorary secretary (to whom the Society owes more than can be known outside its counsels), are prefixed to the Selden volume. Mr. Turner's introduction deals (among other points) with the relations of the different

Courts in the early fourteenth century. At p. xxxvii he might have spared himself some trouble about the old French 'escorcier' or 'escorcher' by comparing the common modern Italian 'scorciare' and its derivatives ('scorciatura' or 'scorciatoio,' a short cut): the meaning is to shorten or abridge, as Mr. Turner rightly judges. In the case where this occurs Bereford C.J. calls counsel a 'wicked caitiff' for insufficient certainty in his pleading. The same counsel, one Laufer—seemingly an unlucky advocate—maintained without success that law could not be waged in debt against the creditor's executors (pl. 17), and elsewhere he is blamed (by the common voice, it seems, not by the Court) for bad pleading; but the same thing befel others too.

Mr. Pike promises us a glossary of Anglo-French when he has edited one volume more for the Record Office. This is good hearing; we quite agree with him as to the need for such an aid to students, and he is one of the half-dozen men (if so many) capable of providing it. The cases in the present volume are published for the first time. At p. 482 we have a description of the forms used in wager of battle on a writ of right, including the curious one of putting a penny in each finger of the glove.

La Démocratie Individualiste. Par Yves Guyot. (Collection des Doctrines Politiques, Vol. VII.) Paris: Giard & Brière. 1907. 8vo. viii and 269 pp. 3 f. 50.

In this little volume M. Yves Guyot, who has probably done more than any other man living to spread an intelligent interest in important economic subjects, sets himself to examine the various elements of which are composed the theories of socialism and individualism and their relation to the essential constituents of democracy. By a brilliant sketch of the evolution of political thought, M. Guyot reaches the position that 'individualism, so far from being an *a priori* conception, is the result of the general experience of humanity,' and after a consideration of the partial definitions of Littré and others himself defines individualism as 'the political doctrine according to which the individual is the end and the State the means.' This is the key-note of his work, which, with a singular lucidity and a wealth of illustration that might in a less skilful treatment confuse and weary the reader, exposes the aims no less than the means of Socialism to a fire of destructive criticism and raillery, economic, historical, and logical. He shows Socialism at every attempt—under Louis XIV, under the rule of the Convention, under the conditions sought to be imposed by modern Labour—plunging into waste and tyranny. 'Paternal governments,' he says, in a delightful phrase, 'are prodigal sons': they seek, according to the conception of Plato, to impose happiness by force, and are incapable of comprehending that nothing can be created out of nothing. This, M. Guyot remarks, is as true of economics as of chemistry; and he offers to spendthrift financiers the formidable maxim, 'Tout se paye, Rien n'est gratuit.'

Democracy, if it means anything worth having, must be based on the principle of equality of all men before the law and in the administration of public affairs; its greatest enemy is therefore the Socialist programme, which was proclaimed by Anseele as 'The dictatorship of the working men: they must be absolute masters. That is the only solution of the evils that are ruining society: it is our solution.' In opposing to this, with the force of his clear thought, the individualist doctrine of government

in the interest, not of a section, but of all, M. Guyot has rendered an admirable service to all students of democracy, and one that is not to be measured merely by the size of his book.

First Principles in Politics. By William Samuel Lilly. Second Edition. London: John Murray. 1907. 8vo. lxiv and 330 pp. (5*s.* net.)

This is an ingeniously written book of speculative politics on anti-democratic lines which are pretty familiar to modern students. As purely political doctrines do not concern this Review, we shall merely note points of contact with positive law. We entirely disagree with many of Mr. Lilly's denunciations and prophesyings, especially his virulent attacks on the French Republic, but this is not the place to discuss them. Mr. Lilly is mistaken when he calls the judgments of the King given upon the advice of the Judicial Committee (not the Privy Council itself, which only gives effect to the Judicial Committee's advice by making it an order) 'irreformable.' The Judicial Committee, unlike the House of Lords, holds itself competent to review its own previous decisions.—It is not true that a thief has no title against a supervening trespasser not acting on behalf of the true owner (p. 44).—'The maxim of jurisprudence "Volenti non fit injuria" does not always hold good' (p. 50). Most true, and Mr. Lilly's examples are just, save that no lawyer ever supposed the maxim to apply beyond private law. However, no legal maxim is literally and universally true. Maxims are not dogmas, only symbols.—The sections on 'The State and Contract' and 'The State and the Land' are commendable for correctness both positive and negative; the common blunders of lay publicists are avoided with remarkable success.—We deny that 'Modern Democracy is the direct issue of the French Revolution' (p. 173), if the proposition is intended to include the modern English constitution and its history. As to America, Mr. Lilly knows very well that American democracy came first; and American publicists have shown cause for believing that the true spiritual father of the Declaration of Independence and its like was not Rousseau but Locke.

In any future edition Mr. Lilly must look to the printing of Greek accents (p. 23).

Real Property, an Introductory Explanation of the law relating to Land. By Alfred F. Topham. With test-questions for the use of students by F. Porter Fausset. London: Butterworth & Co. 1908. 8vo. xxiii and 359 pp. (12*s.* 6*d.*)

The law of real property has always been an unpalatable dish for beginners, owing to its strange mixture of mediaeval theories and modern practice, and year by year it becomes more uninviting and indigestible. Hence the necessity for such works as this of Mr. Topham. As he truly observes, 'a student who approaches the study of the law of land by reading at the outset such a standard work as Williams on Real Property is apt to get confused by the wealth of detail and the extraordinary complication and formality of the early law.' Mr. Topham's book will no doubt be of service to students, and the greater part of it is well done, but we think it would have been even more useful if he had given simple statements of the existing law instead of attempting to condense the

historical explanations to be found in Williams on Real Property. For example, in chapter ii we are told that an estate in land 'is said to be either freehold, copyhold or leasehold,' from which the student may possibly infer that leasehold land cannot be the subject of freehold or copyhold tenure. A few lines further on villein tenure is explained as 'the tenure of a "villager"'; and in chapter iii we find 'manor' defined as follows: 'When several lands are held by different tenants in fee simple of the same lord, the lord is said to have a manor.' If these statements are traced back to their source in more advanced works on real property the student will understand them, but taken by themselves they are more likely to mislead than to help him. Mr. Topham is also a little careless in his definitions of technical terms, as when he tells us that 'feoffment is a granting of the fee,' or when he explains the nature of possessory title under the Land Transfer Acts by saying that 'the person in possession of the land has only to show that he is in possession, he can then be registered with a "possessory title"'. This implies that possessory titles depend on possession, which is rarely, if ever, the case. The statement that when land has once been registered there is no necessity to continue to transfer it by registered transfers ought to be qualified by a reference to s. 16 (2) of the Land Transfer Act, 1897. In a work intended for beginners accuracy in small matters is important.

In stating the rules of succession to property on intestacy, Mr. Topham has made use of some novel diagrams, which may be useful in affording mental exercise to the student.

Compendium of the Law of Torts. By Hugh Fraser. Seventh Edition. London: Sweet & Maxwell, Lim. Sm. 8vo. xxviii and 252 pp. (8*s*.)

Law students in the past have shown their appreciation of Mr. Fraser's excellent short summary of the Law of Torts, and the present generation of students will welcome this new edition which brings the law up to date. We know of no book which states the elements of torts more concisely and with equal accuracy, and we believe that when it is used side by side with the more elaborate books which state and discuss principles, it is a book from which students may derive considerable assistance. We should, however, be sorry for the profession if we thought that the study of such a textbook were regarded as a sufficient qualification for practice at the bar. In the present edition Mr. Fraser has incorporated such of the recent cases and statutes as come within the scope of his work, and he wisely resists the temptation to refer to recent cases which are not of a strictly elementary character.

The treatment of the Workmen's Compensation Act, 1906, is not quite satisfactory. It is difficult to maintain that the subject of workmen's compensation under the Act belongs to the law of torts at all, and a writer for students should show clearly that the right to compensation is a statutory incident of the contract of service and is independent of any negligence or wrongful act on the part of the employer. We think also that the important subject of the law of nuisances might well be treated somewhat more fully. Apart from interference with easements only three or four pages are devoted to the law of nuisances, whilst about fifty pages are given to libel and slander. But it is difficult for a specialist to resist the temptation to treat fully the topics with which he is most familiar.

The Law of Wills. By J. Andrew Strahan. London: Sweet & Maxwell, Lim. 1908. 8vo. xxxiv and 182 pp. (*7s. 6d.*)

This work has been written for students primarily. It comprises a series of lectures delivered by the author at the request of the Council of Legal Education, together with certain additional matter. It is a lucid statement of the salient facts concerning the law of Wills, and both the arrangement of the topics and the outline of each topic will readily appeal to the student's comprehension.

The learned author cites *In re Orlebar, Wynter* v. *Orlebar* [1908] 1 Ch. 136, but we observe that he prefers the decision of Warrington J. in *In re Dobson* [1907] 1 Ch. 284 to that of Neville J. in the former case. We think that the issue between these cases might have been more clearly and emphatically stated, namely, whether property in respect of which a testator has exercised a general power of appointment passes to the 'executor as such,' and whether the testator's general personal estate, or the property appointed, must bear the estate duty.

We can readily recommend this little work to young practitioners about to begin the anxious task of taking instructions for and drafting Wills. A perusal of this book will refresh the memory on all the most important points which it is essential for the draftsman to bear in mind.

Poor Law Settlement and Removal. By Herbert Davey. London: Stevens & Sons, Lim. 8vo. xxix and 364 pp. (*9s.*)

Mr. Davey has made a careful and exhaustive study of the law relating to the settlement and removal of paupers. Much of the learning upon this subject is antiquated and, since the passing of the Divided Parishes Act, 1876, is of little practical importance; but none of it can be said to be wholly obsolete, and we may congratulate Mr. Davey upon his sound judgment in retaining as many of the old cases as are now useful without unduly overloading his text. He discusses the recent cases intelligently and states the law generally with accuracy. Some parts of the book might have been improved if the learned author had referred to cases not immediately concerned with the subject of settlement and removal. For instance, upon the question what deeds of apprenticeship are binding on an infant he cites no case later than *R.* v. *Great Wigston* (3 B. & C. 484). There are many recent authorities of great weight upon this subject, such as *De Francesco* v. *Barnum* (45 Ch. Div. 430), *Walter* v. *Everard* [1891] 2 Q. B. 369, *Corn* v. *Matthews* [1893] 1 Q. B. 310, and *Green* v. *Thompson* [1899] 2 Q. B. 1; and we find no references to the provisions of the Chimney Sweepers Act, 1840, and the Merchant Shipping Act, 1894, in regard to apprentices. The Chimney Sweepers Act of 1787, which is referred to, has been long repealed, as also has 10 Geo. II. c. xxxi (Thames Watermen), which is referred to on the same page. Another case which has been overlooked is *Woodstock Union* v. *Shipston-on-Stour Union* (62 L. J. M. C. 43), which decides that in accordance with 31 Geo. II. c. ii. s. 1, a settlement may be acquired by an instrument of apprenticeship in writing, signed, but not sealed, by the parties. Mr. Davey, at page 113, says that the instrument need not be sealed, but must be duly executed in every other respect and stamped, 'the agreement must therefore be by deed.' This statement is unin-

telligible, and the concluding words are inconsistent with the decision last referred to.

There is an appendix of 133 pages containing at length reports of a number of cases reprinted from the Law Journal Reports and of a number of statutes. Mr. Davey very properly gives the dates of all cases cited by him, and we must say that without the dates we should find some difficulty in tracing some of the cases; for instance, the reference to *Reg.* v. *Cookham* is given as 9 Q. B. 522, instead of 9 Q. B. D. 522, and a similar mistake occurs in many other cases. In other cases there is confusion between the year of the decision and the year of the report. Thus we find '*West Ham* v. *London County Council* (1903) 73 L. J. Q. B. 85, A. C. 40,' instead of [1904] A. C. 40. Little mistakes of this kind are so frequent as to deserve notice. They are irritating.

The Agricultural Holdings Act, 1906. By GEORGE ARTHUR JOHNSTON. Second Edition. London: Effingham Wilson. 1908. 8vo. 198 pp. (3*s*. 6*d*. net.)

THIS book is designed for the use of 'those who are connected with, or interested in land which is used for agricultural or market gardening purposes,' rather than for lawyers.

It contains a careful epitome of the Agricultural Holdings Acts, followed by the text of the Amending Act of 1906, annotated. The Appendix comprises the Agricultural Holdings Acts, 1883 to 1900, with the Rules of the Board of Agriculture and the County Court Rules issued in 1900. These rules and the forms accompanying them appear on the face of them to be inapplicable without some amendment to the present state of the law. The amending Act does not come into force till January 1, 1909, before which time new rules and forms will presumably be issued.

The author discusses freely the interpretation to be given to the new Act. Whilst we cannot agree with some of his conclusions, we commend his courage in facing unsolved problems.

The effect of the various Acts might have been shown more clearly if the amendments had been incorporated in the principal Act as they would be in a consolidating Act. An unlearned reader will make but little sense of the Act of 1906 if he has to turn to the appendix to find each of the sections of the earlier Acts which are thereby amended or repealed.

A Concise Treatise on the Law of Mortgage. Second Edition. By W. F. BEDDOES. London: Stevens & Sons, Lim. 1908. 8vo. lxiv and 360 pp. (12*s*. 6*d*.)

WE welcome a second edition of this work not only because we think it will be useful to students, but also because a little book on a big subject is likely to be of service to the busy practitioner who wants to refresh his memory on some elementary or broad principle without diving into the recesses of an unwieldy volume. And the volume before us seems well fitted to answer both purposes.

In the present edition a chapter on the Land Transfer Acts has been

added, and the cases reported since the last edition, down to December 1907, have been noted. Various other additions have been made and the work has been revised throughout.

We have tested the book in many ways and have not found it wanting. It is for the most part carefully, clearly, and accurately written, and contains a good deal of matter in a small compass. On the other hand it contains some errors which might easily have been avoided, for instance, the Copyhold Act, 1887 is in several places referred to, but we have been unable to find any reference to the Copyhold Act, 1894, by which the former Act was wholly repealed.

District Councils. By H. D. Cornish. London: Stevens & Sons, Lim. 1908. 8vo. xxiii and 412 pp. (*7s. 6d.*)

Mr. Cornish's handbook will doubtless be found useful by District Councillors who desire to acquire a general knowledge of their powers and duties. The subject-matters are arranged in alphabetical order, and each consists of a concise summary of the statutory provisions, with references to some of the more important decisions thereon. The law seems to be generally stated with as much accuracy and completeness as is compatible with the method and scope of the work.

We should, however, have expected to find the subject of 'Contracts' more clearly explained. There is no reference to the common law rule that contracts of corporations must be under seal. The special statutory provision in the Public Health Act with reference to Contracts of Urban Councils is referred to, and *Lawford* v. *Billericay* R. D. C. [1903] 1 K. B. 772 is stated in connexion therewith, but without any hint at the rule to which that case establishes an exception. It is much more important to warn the district councillor of the necessity for sealing the contracts of his council than to tell him how in special circumstances he can avoid the consequences of neglect.

We have no doubt the book will be appreciated by those who are interested in local government and lack either the time or the patience to study more elaborate treatises.

The Law Relating to Companies and Limited Partnerships. By John R. McIlraith. London: George Routledge & Sons, Lim.; New York: E. P. Dutton & Co. 1908. viii and 288 pp. (*1s.*)

The Companies Acts, 1900 and 1907. By James W. Reid. London: Effingham Wilson. 1908. iii and 131 pp. (*2s. 6d.* net.)

Responsibilities of Directors and Working of Companies under the Companies Acts, 1862–1907. By Anthony Pulbrook. Second Edition, by G. F. Emery. London: Effingham Wilson. 1908. xix and 308 pp. (*3s. 6d.* net.)

Having regard to the fact that all the Companies Acts from 1862 to 1907, inclusive, will shortly—probably in the next autumn session—be consolidated into one statute, it is surprising that so much energy should be displayed in writing books on the existing but soon to be repealed Acts. Perhaps the results of these efforts are meant to assist our legislators in getting up sufficiently an important branch of law which is soon

to be brought before them—has in fact been already brought before some of them—in a concrete form. What is now occupying much of the attention of company draftsmen is the curiously drawn thirty-seventh section of the Act of 1907 (which will be in operation when this review appears in print), defining the new kind of 'private company' which is one of the offspring of the new Act. Some of the questions which arise on the section are: Must an existing company alter its articles before July 1 in order to be a private company? What is a sufficient restriction of the right to transfer shares? How is the limit of fifty shareholders (exclusive of persons who are in the employment of the Company) to be preserved? What happens if a company whose articles prohibit invitations to the public for share or debenture capital disregards the prohibition? Whether a private company cannot turn itself into a public company by simply striking out the prohibitive clauses of its articles, and, if not, what sort of a thing does it become by such a striking out?

Mr. McIlraith's book is a useful introduction, in a small compass, to company law generally, and it also contains a useful chapter on limited partnerships, as regards which he is rather more optimistic than most lawyers.

Mr. Reid's book is written to show business men the changes effected by the Acts of 1900 and 1907, and is in many respects useful. It will, at any rate, send many of its readers who are connected with companies in haste to their lawyers. Besides giving the two recent Acts in full, it sets out the material sections in former Acts which are affected by or referred to in the new enactments.

The book edited by Mr. Emery shows the alterations in company law which have taken place since the publication of the first edition, which was written by the late Mr. Anthony Pulbrook, a solicitor who took a keen interest in the subject. He would, if alive, be quite satisfied with the reverence with which the new editor has treated his original remarks. This book contains many useful hints to directors and others, and sets out the two new Acts, with notes.

These little books are all useful in their respective ways, and many small points are suggested, which might escape persons who are well acquainted with their subject-matter.

We have also received:—

International Documents: a collection of international conventions and declarations of a law-making kind. Edited, with Introduction and Notes, by E. A. Whittuck. London: Longmans, Green & Co. 1908. 8vo. xxxviii, 1–234 double (translation opposite text), and 235–252 pp. (10*s.* 6*d.* net.)—The title of this volume is accurate, but not very informing. In fact all the documents here collected relate to war and arbitration. Part 1 (which is very short) contains the Declaration of Paris, the Geneva Convention with its later additions, and the Declaration of St. Petersburg; Part 2, the Acts of The Hague Conference of 1899, and the Geneva Convention of 1906; and Part 3, those of The Hague Conference of 1907. Mr. Whittuck has supervised the reprinting of all this material, both French text and English translation, in a handy form, and has added a concise and workmanlike introduction and a few brief

explanatory notes. Many students of international law and affairs will be glad to have this important body of conventional rules bound together in good print. An index would have increased the utility of the book; the omission of any general statement of the contents is perhaps accidental. The reader is duly warned that the conventions agreed upon at The Hague in 1907 by the delegates of the Powers were subject to ratification by their principals, and that the extent of the final ratifications could not be known at the date of publication (see now the Times and other newspapers of July 2, 1908).

Mozley and Whiteley's Law Dictionary. Third Edition. By LEONARD H. WEST and F. G. NEAVE. London: Butterworth & Co. 1908. 8vo. 369 pp. (10*s.* 6*d.* net.)—More concise than most law dictionaries, which so far is a virtue, and probably not less accurate: but the collector of 'howlers' may pause on 'Allegans suam turpitudinem non est audiendus: no man is allowed to incriminate himself', where the Latin is falsely translated (it means, of course, that a man may not rely on his own illegal or immoral conduct as part of his case), and the proposition which figures as a translation is manifestly not true. The first man who produces a really revised law dictionary with references to trustworthy authorities will deserve well of the profession.

Archbold's Quarter Sessions Practice. Sixth Edition. By FRANCIS R. Y. RADCLIFFE, K.C. London: Butterworth & Co., and Shaw & Sons. 1908. 8vo. lvi and 732 pp. (25*s.* net.)—It is scarcely necessary to do more than to record the appearance of the sixth edition of this standard work in a more convenient *format* and under the capable editorship of Mr. Radcliffe, K.C. The book is distinguished by its excellent collection of forms, which are now collected together at the end of the work and have received numerous and valuable additions. The inclusion of various Home Office Memoranda will also be found useful by those who have to dispense justice at Quarter Sessions. The work in its present form will no doubt maintain its high position.

The Principles of Bankruptcy. By RICHARD RINGWOOD. Tenth Edition. London: Stevens & Haynes. 1908. 8vo. xxxviii and 439 pp. (10*s.* 6*d.*)—Mr. Ringwood's sketch of Bankruptcy Law is well known. The present edition, like its predecessors, contains a carefully written and condensed statement of the law in a form convenient for business men. For students less detail and a greater explanation of the general principles would be an advantage. Condensed statements of the law, however accurate in themselves, are not so easily understood and remembered as are more discursive statements with explanation and well-chosen illustrations. Sometimes the attempt to condense results in obscurity; for instance, in speaking of the effect of disclaimer of a lease upon tenant's fixtures, Mr. Ringwood says, 'if the trustee disclaims the landlord should either take the tenant's fixtures at a valuation or give a reasonable time to the trustee to remove them before disclaimer.' The latter part of this sentence reads as if it were the landlord who had to give the reasonable time and to disclaim. The sentence is in our opinion calculated to puzzle any one who has not the opportunity of looking up the case cited as the authority for the proposition (*In re Moser*, 13 Q. B. D. 738).

The new edition appears to be well brought up to date and to be in no way inferior to its predecessors.

The Finance Act, 1907, in its Relation to Income Tax. By T. HALLETT FRY. London: Stevens & Sons, Lim. 8vo. viii and 100 pp. (6*s.*)—In this little book Mr. Fry explains the new law relating to Income Tax contained in ss. 18 to 28 of the Finance Act, 1907. He gives the forms in use, and explains carefully and fully how they are to be used and what particulars should be given to entitle a taxpayer to relief in respect of tax upon unearned income. The actual law is contained almost wholly in the sections themselves, and only seven cases are referred to. With regard to these we regret that Mr. Fry has not given references to the best reports. Three of the cases which are reported in the Law Reports are cited only from reports which are either not generally accessible or not of much authority.

The effect of s. 19 (8) of the Finance Act, 1907 may be, as the author says, not quite clear; but we think Mr. Fry has failed to appreciate its effect. What it appears to do is, in effect, to repeal s. 34 (1) of the Finance Act, 1894, that subsection having ceased to be operative by reason of s. 8 of the Finance Act, 1898.

In other respects Mr. Fry's comments on the Act are suggestive and useful.

Legal Representatives. By SYDNEY EDWARD WILLIAMS. Second Edition. London: Stevens & Sons, Lim. 1908. 8vo. lxviii and 324 pp. (9*s.*)—This book may be described as an annotated index, and is well designed to supply the practitioner with cases on everyday points relating to real and personal representatives. Our review of the preceding edition (L.Q.R. xvi. 208) expressed a favourable opinion of the book, an opinion vindicated by the appearance of the present edition, which will doubtless maintain its position among living textbooks.

The Law and Practice relating to the Formation of Companies (limited by shares) under the Companies Acts, 1862 to 1907. By VALE NICOLAS. Third Edition, by the Author and W. F. LAWRENCE. London: Butterworth & Co. 1908. 8vo. xxxvii and 357 pp. (17*s.* 6*d.* net.)—The first edition of this work came out in 1903, and the second in 1904. In less than four more years we get a book increased in size and improved in quality. The Act of 1907 is given in full, with some notes, and there is an appendix of useful forms. These have been altered 'so as to include both present and future requirements.' Any one who has read the Companies Act, 1907, will have observed the necessity of making, at an early date, considerable alterations in existing articles of association.

The Companies Acts, 1900 and 1907, with Commentaries. By PAUL FREDERICK SIMONSON. London: Effingham Wilson, and Sweet & Maxwell, Lim. 1908. 8vo. lxvi and 265 pp.—Mr. Simonson has written several books on different branches of company law, and the volume under review is the best of all his works. The introduction, which occupies forty-one pages, is admirable. The two Acts are, of course, given *in extenso*, and the notes are full, but not too full, clear, and learned. The notes on the thirty-seventh section of the Act of 1907 (private companies) are especially valuable, and contain, amongst other things, a comparison of the advantages of a private company and a limited partnership which is by no means favourable to the latter.

Talbot and Fort's Index of Cases Judicially Noticed, 1865–1905. Second Edition. By M. R. MEHTA. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1908. La. 8vo. 1025 pp. (38*s.*)—The new edition of 'Talbot and Fort' should be welcomed by the profession. It gives in a handy form the result of forty years' noting-up. This edition follows the lines of the old work, the only new features being that the manner of judicial treatment is shown, and that the dates of the cases in which the original decision is cited are now omitted. We notice some minute errors, mostly survivals from the first edition, but on the whole the work is extremely well done.

An Everyday Guide for the Secretary and other Officials of a Limited Company. By T. HALLETT FRY and HOWARD DEIGHTON. London: Effingham Wilson. 1908. 8vo. 138 pp. (*2s. 6d.* net.)—The writers do not seem to think limited partnership will be attractive to business men as compared with private companies. We do not agree with them that there is any serious risk of the right of a limited partner to 'advise with the partners' leading him into being held liable as a general partner for taking part in the management, which means, we conceive, acts of management apparent to third persons.

The Constitutional History of England. A course of Lectures delivered by F. W. MAITLAND. Cambridge University Press. 1908. 8vo. xxviii and 548 pp. (12*s.* 6*d.*)—This book comes too late for more than bare acknowledgment in this number. The Publishers' note states that the Lectures were delivered by Professor Maitland at Cambridge during the Michaelmas Term of 1887 and the Lent Term of 1888. They contain a sketch of English public law at five periods, namely at the years 1307, 1509, 1625, 1702 and 1887, and are now published as an Introduction to the study of English Constitutional History.

Leet Jurisdiction in England, especially as illustrated by the Records of the Court Leet of Southampton. By F. J. C. HEARNSHAW. Southampton Record Society. Southampton: Cox & Sharland. 1908. La. 8vo. xv and 406 pp.—Review will follow.

Deeds Registration in Australasia. By JAMES EDWARD HOGG. London: Stevens & Sons, Lim. Sydney: Law Book Co. of Australasia, Lim. Melbourne: C. F. Maxwell. 1908. 8vo. xxix and 172 pp. (12*s.* 6*d.*)—Review will follow.

The Law relating to Dogs. By MONTAGUE R. EMANUEL. London: Stevens & Sons, Lim. 1908. 8vo. ix and 131 pp. (3*s.* 6*d.*)

A General View of the Law of Property. By J. ANDREW STRAHAN and J. SINCLAIR BAXTER. Fifth Edition. London: Stevens & Sons, Lim. 1908. 8vo. xxxii, 420 and 24 (index) pp. (12*s.* 6*d.*)

A Practical Companion to the Indian Merchandise Marks Act IV of 1889, with notes, &c. By ANANDRAM MEWARAM JAGTIANI. Second Edition, revised and enlarged. Karachi: Union Press, Lim. London: Luzac & Co. (8*s.* net.)

The Law of Carriers of Merchandize and Passengers by land. By WALTER HENRY MACNAMARA. Second Edition, by the Author and W. A. ROBERTSON. London: Stevens & Sons, Lim. 1908. La. 8vo. xxxvii and 672 pp. (30*s.*)—Review will follow.

The Law of the Federal and State Constitutions of the United States. By FREDERIC JESUP STIMSON. Boston: Boston Book Co. 1908. La. 8vo. xix and 386 pp.

The Law of Copyright in Designs. By LEWIS EDMUNDS, K.C., and HERBERT BENTWICH. Second Edition. London: Sweet & Maxwell, Lim. 1908. La. 8vo. xliii and 488 pp. (25*s.*)

The Public Trustee Act, 1906, with introduction and notes. By F. G. CHAMPERNOWNE, HENRY JOHNSTON, and JOHN S. C. BRIDGE. London: Butterworth & Co. 1908. La. 8vo. 18+160+18 pp. (6*s.* net.)

International Law applied to the Russo-Japanese War. With the Decisions of the Japanese Prize Courts. By SAKUYÉ TAKAHASHI, Professor of International Law in the Imperial University of Tokyo. London: Stevens & Sons, Lim. 1908. La. 8vo. 823 pp. (32*s.* net.)—Review will follow.

The Law in General Practice. Some chapters in Every-Day Forensic Medicine. By STANLEY B. ATKINSON, M.B. London: Henry Frowde; Hodder & Stoughton. 1908. 8vo. viii and 239 pp. (7*s.* 6*d.*)—Review will follow.

The Diseases of Workmen. By T. LUSON, M.D., and R. HYDE, M.R.C.S. With an introduction by His Honour Judge RUEGG, K.C. London: Butterworth & Co. 1908. 8vo. viii and 111 pp. (4*s.* net.)

Principles of the Criminal Law. By SEYMOUR F. HARRIS. Eleventh Edition. By CHARLES L. ATTENBOROUGH. London: Stevens & Haynes. 1908. 8vo. xl and 597 pp. (20*s.*)

Criminal Appeals under the Criminal Appeal Act of 1907, with Rules of Court and Forms. By A. C. FORSTER-BOULTON, M.P. London: Butterworth & Co. 1908. 8vo. xiv, 115 and 6 pp. (5*s.* net.)

The Alberta Law Reports. Reported under the authority of the Law Society of Alberta. Editor, C. C. MCCAUL, K.C. Vol I, Part I. Toronto: Carswell Publishing Co., Lim. 1908. La. 8vo. 48 pp.

Ruling Cases. Arranged, annotated, and edited by ROBERT CAMPBELL, with American notes by JAMES T. KEEN. Vol. XXVII (first supplementary volume), Abandonment—Will. Addenda. London: Stevens & Sons, Lim. Boston, Mass.: The Boston Book Co. 1908. 8vo. xliii and 708 pp.

Encyclopaedia of the Laws of England, with Forms and Precedents. Second Edition, revised and enlarged. Vol. XI. Peace to Proclamation. London: Sweet & Maxwell, Lim. Edinburgh: Wm. Green & Sons. 1908. La. 8vo. vii and 699 pp. (21*s.* net per vol.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE and W. BOWSTEAD. Vol. XCVIII. 1853–1854 (3 De G. M. & G.; 14 C. B.; 23 L. J.) London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1908. La. 8vo. xvi and 868 pp.

State and Family in Early Rome. By CHARLES W. L. LAUNSPACH. London: George Bell & Sons. 1908. 8vo. xx and 288 pp. (*7s. 6d.* net.)

Die Trennung von Staat und Kirche. Von KARL ROTHENBÜCHER. München: C. H. Beck. 1908. La. 8vo. xv and 478 pp. (M. 14.)

An Analysis of Williams on the Law of Real Property, for the use of Students. By A. M. WILSHERE. London: Sweet & Maxwell, Lim. 1908. 8vo. vii and 135 pp. (*5s.*)

La Justice Privée. Par LOUIS CRÉMIEU. Paris: J. B. Sirey (Larose et Forcel). 1908. La. 8vo. xv and 324 pp. (*8fr.*)

A Summary of the Law of Companies. By T. EUSTACE SMITH. Tenth Edition. By the Author and W. A. BEWES. London: Stevens and Haynes. 1908. 8vo. xxi and 323 pp. (*7s. 6d.*)

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EDITED BY SIR FREDERICK POLLOCK, BART., D.C.L., LL.D.

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NOTES.

THE preference of our Courts for awarding compensation rather than penalization as the proper verdict for difficulties brought about by an infringement of a civil or *quasi* civil right is once more shown in the case of *Lodge Holes Colliery Co., Lim.* v. *Mayor, &c., of Wednesbury* [1908] A.C. 323. The appellants, whilst working a mine which ran under a roadway, let down the surface in such a manner as to damage the road and render it unfit for user. The road authorities, apparently without pausing to consider how the actual damage could most easily and inexpensively be made good, built the road up to its former level at a cost of £400.

There was no actual necessity to have raised the level of the road at all, as an equally commodious thoroughfare might have been made by a simple reparation of the surface at one-fifth of the cost.

The House of Lords told the appellants that people who interfered with the convenience of the public must not expect the Courts to be very zealous in curtailing the consequent liability, and an illustration of their lordships' declaration may be found in the case of *Savin* v. *Oswestry Highway Board* (1879) 44 J. P. 766, in which case the cost of building a better road than the one damaged was laid upon the shoulders of the defendant.

In *Savin's* case the road originally was made for light traffic only, but having been damaged by the defendant's traction engines, it was found necessary when repairing it to make it strong enough in the future to bear heavier traffic. The Divisional Court held that as the defendant was a wrong-doer, and the cost of the repairs could not be distinguished from the cost of strengthening the road, the whole must be borne by the defendant. In the *Lodge Holes Colliery Company's* case the House of Lords held that the repair of the surface would have put the road into a perfectly satisfactory state for public user, and limited the damages to the smaller amount.

The aim of the Locomotive Acts in their provisions upon this subject is not to impose a penalty, but simply to ensure that those

who by a user of the road cause unusual damage shall themselves defray the additional cost of maintenance. The wrong is not technically a mere tort (*Chesterfield Rural Council* v. *Newton* [1904] 1 K. B. 66; per Collins M. R.), but it is one in effect (*Story* v. *Sheard*, [1892] 2 Q. B. 518). Under the Act of 1878 the action was one merely for the recovery of expenses, but by the Act of 1898, s. 12 (1), it is now one for the recovery of damages: see *Kent County Council* v. *Folkestone Corporation* [1905] 1 K. B. 629, per Vaughan Williams L. J.

The *ejusdem generis* rule of interpretation is one of those artificial but necessary creations of law which are designed to teach people the necessity of employing clear and accurate modes of expression in their dealings with one another. Familiar modes of expression must be interpreted consistently, and this has led to the establishment of the rule that general descriptive words following particular ones only extend the latter to a very limited degree, i.e. they only effect the inclusion of other objects of the same character as those particularly described.

In *Larsen* v. *Sylvester & Co.* [1908] A. C. 295, the parties to a charter party introduced an expression which fortunately for the charterers excluded the application of the rule, and gave full play to what was undoubtedly the real intention of the parties. By the terms of this particular document the parties mutually exempted each other from liability arising from 'frosts, floods, strikes . . ., and any other unavoidable accidents or hindrances of what kind soever beyond their control delaying the loading of the cargo.' Delay in loading was caused by the congested state of the ships at the loading port, but Lord Loreburn L. C., with the concurrence of the other law lords present, whilst freely conceding that the congestion of traffic was not in the same genus as those particularly specified, held that, upon the natural construction of the clause, it must be taken to come within the wide general words at the end. It has, however, to be borne in mind that in this case there was nothing in the special relations of the parties, or in the substance of the transaction which could cast a doubt upon the meaning of these general words. It would not be safe to apply such a free interpretation to every document wherein similar words might be found. See *Lord Provost and Magistrates of Glasgow* v. *Farie* (1889) 13 App. Cas. at 675, per Lord Watson. Even where it is applicable as a pure proposition of law, the circumstances of the transaction may sometimes limit its effect, see *Hext* v. *Gill* (1872) L. R. 7 Ch., per Mellish L. J. at p. 718.

It is really refreshing to find common sense applied as it now is to the construction of wills. Common sense is perhaps a dangerous word to use in connexion with law and legal interpretation, but what it means in this connexion is the view of the testator's words which ninety-nine out of a hundred sensible people would take if they were asked. As the embodiment of this common sense the Court seats itself in the testator's armchair and surveys the situation. It recognizes of course that a testator's intentions can only be known by the words he has used, the 'intendment of the will,' as it is called, but it imports also into its reading of the will a knowledge of human nature—its habits and motives; above all it recognizes that there are intentions and intentions—that some are governing and absolute, others subsidiary and qualified, and it discriminates between them. In this weighing and balancing of intentions lies the real art of construction. In *Re Sharp, Maddison* v. *Gill* [1908] 2 Ch. 190 is a recent example. A testator in a commendably brief will and codicil gives his residuary estate upon trust for certain persons—five in number and—reading will and codicil together—'for the six children now living of Samuel Frederick Okey by his first wife in equal shares as tenants-in-common.' Now there *had* been six children of Samuel Frederick Okey by his first wife, but at the date of the will only one of the six was living, and the question was whether the residuary estate was divisible in elevenths or in sixths. If in elevenths, the five shares of S. F. Okey's five children who had died were undisposed of. What was the testator's governing intention? Evidently to benefit the children of a certain person S. F. Okey. Was that intention to be defeated by the accident of an inaccurate description in the number of the children—*falsa demonstratio*? The Court held certainly not. What the testator really meant to have said was for 'such of the six children as shall then be living.' But what is to be done when there is no common-sense view? For the layman's frequent assumption that his own first off-hand impression is the only possible or sensible one will not stand criticism. Failing common sense, we still need a certain number of artificial rules of construction, and such rules are useful in their proper place; that is to say, when they are not allowed to usurp the commanding position of rules of law. This is the moral, as we read it, of Vaughan Hawkins's admirable preface to his book.

In *Mansell* v. *Valley Printing Company* [1908] 2 Ch. 441, 77 L.J. Ch. 397, the Court of Appeal has affirmed a rule of great importance in principle, and has done so in the clearest manner. The right to retain the publication of unpublished work of any kind is proprietary; it is independent of property in any tangible material

such as a MS. or a canvas; and, being proprietary, though it need not have a corporeal object, it may be infringed without wrongful intention or knowledge. 'The element of motive or intention on the part of the defendant is wholly irrelevant,' per Cozens-Hardy M.R. at p. 445. To put the point in the shortest form, the right is an absolute right, and the violation of it is a *quasi* trespass. The case of a trade-mark at common law was different; there the jurisdiction was founded on 'passing off,' i.e. not on property but on fraud, per Farwell L.J. at p. 448.

'One cannot prescribe in a que estate for a commercial profit à prendre in alieno solo; it must be for a profit à prendre measured by the nature, size, and necessities of the estate. A prescription in a que estate for a profit to be taken without limit, not with reference to the wants of the estate, but commercially for purposes of sale, is unknown to the law.' So Buckley L.J. formulated the legal ground of the judgment of the Court of Appeal reversing that of Neville J. in the case of the Wye fishery: *Lord Chesterfield* v. *Harris* [1908] 2 Ch. 397, 424. It is difficult to deny this proposition; but if the case is taken to the House of Lords it will remain to be seen whether the ingenuity of counsel may not yet extract from the mass of facts a more plausible ground for the right claimed by the fishermen.

The difference of opinion in the Court of Appeal in *Hyams* v. *Stuart King* [1908] 2 K.B. 696, 77 L.J. K.B. 794, requires fuller consideration and discussion than we can now give to it. Sir Gorell Barnes and Farwell L.J. held, against Fletcher Moulton L.J., that a defendant's promise to pay a balance due for gaming debts may be supported by forbearance or a promise thereof on the part of the plaintiff, who admittedly has no such legal right of action for the balance as he would if it were a balance of account in a lawful business. All we can say off-hand is that, until the House of Lords finally decides the question or further legislation intervenes, the dissenting judgment is not to be neglected.

In *Elliston* v. *Reacher* [1908] 2 Ch. 374, 77 L.J. Ch. 617, Parker J. defines the circumstances under which the owner of a piece of land sold subject to restrictions can compel the observance of stipulations against other holders of land comprised in the same scheme of sale. The present decision sums up, perhaps we may say finally for the present, the results of numerous earlier ones.

Where restrictive covenants are placed upon a piece of land simply in order that the vendor may realize a better price for another piece which he retains, there a purchaser of the latter is not entitled to enforce the observance of those restrictions, unless the right to do so was expressly reserved by the vendor for his successors, and was acquired by them when the vendor parted with the land. See *Reynals* v. *Cowlishaw* (1878) 9 Ch. D. at p. 130 and (1879) 11 Ch. D. at p. 868.

Where land is to take the benefit of restrictive covenants on other land both the fact of the privilege and the land which is to enjoy it must be clearly defined, and it is clear that the right will not exist where the restrictions appear to have been imposed merely for the personal benefit of the grantor whilst retaining the former (ibid.).

Where, however, several plots of land are sold and restrictive covenants are imposed for the purpose of enhancing the value of them all, a different situation arises, a community of interest and obligation is brought about, and a purchaser of one plot, who is informed of the scheme at the time, can afterwards prevent the vendor selling the other plots without the restrictions; see *Spicer* v. *Martin* (1889) 14 App. Cas. 12. But it must be made perfectly clear that all the lands are to be affected; *Osborne* v. *Bradley* [1903] 2 Ch. 446. In *Piggott* v. *Stratton*, 1 D. F. & J. 33, the Court restrained a lessee who had underlet a piece of land, giving a mere oral representation that he was precluded from building on another piece which he retained in such a manner as to obstruct the sea-view of the piece he was then subletting, from afterwards trying to obtain a release from his superior lessor of that restriction. The Court declined to permit such a piece of bad faith. This was a case of equitable estoppel proceeding on the particular merits and adding nothing to the substantive law of restrictive covenants. To carry the main proposition a step further, the purchasers of the other plots, if they have agreed to be bound by the restrictions, have the right, *inter se*, to compel one another to duly observe them; *Nottingham Patent Brick and Tile Co.* v. *Butler* (1885) 15 Q. B. D. 261.

Elliston v. *Reacher* was a case of a building scheme, and the land sold by the original vendors was sold to all the purchasers upon that footing. The restrictions were contained in a prepared Indenture of Covenants which all the original purchasers covenanted in their conveyances to observe, but the indenture itself was in fact never executed. Parker J. held that the purchasers all bought their plots on the footing that every plot of land was to be bound by the restrictions, and his lordship laid it down generally that purchasers and their successors possess the right *inter se* to

compel the observance of restrictions whenever (1) they derive title under a common vendor, (2) who has laid out the whole of the land under a scheme, (3) intended to bind and benefit the whole of the land comprised in it, (4) and the persons seeking the assistance of the Court, or their predecessors, have purchased upon that footing.

From the beginnings of limited company formation in 1862, Parliament has been doing its best to secure that the capital of a company, if it is to be limited in amount, shall at least be a reality. It was this object which dictated the provision of the Legislature in sec. 4 of the Companies Act, 1900, that a company is not to go to allotment until the moneys due on the minimum subscription have been 'paid to and received by the company.' The word payment by itself was too equivocal—as earlier cases had shown—to be relied on. It might be satisfied by a mere set-off (*Spargo's* case (1873) L. R. 8 Ch. 407). Even the phrase 'paid to and received by the company' was not free from ambiguity. A strong Scottish Court had taken the view that a cheque might be payment though it had not been cleared before allotment (*Glasgow Pavilion* v. *Motherwell* [1903] 6 F. 116). It was not till *Mears* v. *Western Canada Pulp and Paper Co.* [1905] 2 Ch. 353, that the necessity of actual payment was established. Now we have two cases illustrating the risks which companies and their directors run in not taking care that these statutory provisions are strictly complied with before the directors go to allotment. In the first—*Re National Motor Mail Coach Co., Austis' and M'Lean's Claims* ([1908] 2 Ch. 228) 34,000 shares had been taken up and duly paid for, but a small proportion—1,000 shares—were taken by the directors and, though they gave their cheques which were duly honoured on presentation, the cheques, owing to some oversight of the company's secretary, were not paid into the company's banking account till some three or four days after the directors had gone to allotment. What happens? The company has sustained no real damage, but a technical irregularity has been committed, and certain shareholders, who want to get rid of their bargain, take advantage of the irregularity to repudiate their shares. In doing so they were, no doubt, strictly within their rights, but what a lesson to directors of the risk they run in not complying with the letter of the section. They may bring the whole concern tumbling down like a house of cards; for what one shareholder may do every shareholder is entitled to do. Nor is it necessary for the repudiating shareholder to institute legal proceedings. It is enough that he gives notice to avoid his contract. The ordinary rule requiring

a rescinding shareholder to take steps promptly to have his name removed from the register, does not apply to the special remedy under the Companies Act, 1900.

Burton v. *Bevan* [1908] 2 Ch. 240, 77 L. J. Ch. 591, points the same lesson—the importance of not going to allotment before cheques for subscription moneys are cleared, but the case adds a good deal to our knowledge of section 4 in deciding that the section, in regard to the return of subscription moneys, applies only before allotment. When an allotment has once been made, though in contravention of the Act, it is only voidable at the option of the shareholder; the company cannot return the moneys. The shareholder may say 'No, I prefer to adhere to the contract.' For deciding whether or not he will exercise this option the Act gives the shareholder down to a month from the date of the statutory meeting, the theory being that at that meeting he will be able to ascertain the position of affairs. But his remedies are not restricted to repudiation. He may sue the directors personally for any loss he may have sustained by reason of their having 'knowingly contravened' the section, and this is what the shareholder did in *Burton* v. *Bevan*. 'Knowingly contravening,' what does that mean? It means, says Neville J., contravening the section 'with knowledge of the facts upon which contravention depends.' Directors cannot plead ignorance of the law. In *Burton* v. *Bevan* the defendant director had not been present at the meeting at which his co-directors proceeded to allotment, nor had he known that they intended to do so, but at a subsequent meeting he had heard the minutes of the previous meeting read, and had joined in confirming them. But this in Neville J.'s opinion was not enough to fix him with liability under the section. Everyone knows how much attention is paid to formal minutes of previous proceedings.

A Puzzle in the Law of Allegiance (p. 245 above).

Dr. Wilhelm Pappenheim, of Vienna, kindly sends us the following contribution:—

No doubt a child born in Turkish territorial waters is reputed born in Turkey. Art. 2 of the Turkish 'Loi sur la nationalité ottomane, du 19 janvier 1869' (Sieber, Das Staatsbürgerrecht im internationalen Verkehr, seine Erwerbung und sein Verlust, p. 285) runs as follows:—

'Tout individu, né sur le territoire ottoman de parents étrangers, peut, dans les trois années qui suivront sa majorité, revendiquer la qualité de sujet ottoman.'

I suppose that this benefit accorded to the child of 'parents *étrangers*' is equally, and, indeed, especially meant for children of no nationality. But there is a further question (or puzzle) to be resolved: When does the term of three years begin? When does a 'heimatalos' (ἄπολις) come of age? I suppose the question must be—so far as Turkish authorities will have to decide—resolved according to the Turkish law of majority, and so the child in question will, when sixteen years old, be entitled to put forward his claim of Turkish citizenship.

[In case he does this at the Turkish Consulate in Paris, what will French authority have to say to it?]

Dr. Felix Lieberles, also of Vienna, writes:—

If, after the Treaty of Cession, by which the Philippine Islands were given over to the United States, the Filipinos were neither allowed to remain Spanish subjects, nor the United States citizenship conferred upon them, this state of things is against the Law of Nations, which requires that in cases of occupation as a consequence of war an option shall be given to the conquered people between the former nationality and the nationality of the conqueror. If Spain did not, by the treaty or a subsequent Spanish statute, deprive the Filipinos of the Spanish allegiance, this unlawful state of things must be disregarded by the judges of any other jurisdiction outside the United States. The child in question is therefore, in my opinion, a Spanish subject.

[Assuming that no contrary authority can be found in the books, what is the probability that any Court would at this day follow Dr. Lieberles' opinion in practice? There are many ways of evading inconvenient points. According to Hall, International Law, 5th ed., p. 572, it is only a matter of modern usage to insert an option clause in the treaty of cession. But I incline to think that a person under the protection of the United States is a subject of the United States for international purposes, the extent of his civil and political rights being a domestic matter with which foreign jurisdictions are not concerned.—F. P.]

We have received the report of the third annual meeting of the American Association of Law Libraries, which we have not space to publish in full. The meeting was held at Lake Minnetonka, Minnesota, June 22–24, 1908, with a post-conference session in the State Library at St. Paul on the 26th and 27th. There were forty-seven persons present at the several sessions, all, with the exception

of a few, being members of the Association. The proceedings will be published, together with the papers read, in the 'Index to Legal Periodicals and Law Library Journal,' the official organ of the Association.

The most important items of business transacted were those connected with the 'Index' above mentioned. From comments at the meeting by members from different parts of the country, it would seem that the first number of the Index had met with very general commendation. The criticisms were numerous but of a friendly character. The managing editor, Mr. Frederick W. Schenk, reported that the co-operative method of indexing was not satisfactory, and it was decided to abandon that method as soon as possible, probably after the publication of the third number. It was decided further to issue the second number during July and to have it index the chief legal periodicals of the United States, England, Canada and Australia issued during the first six months of the year; the third number in October, and to include therein indexing material for July, August and September; the fourth number in January, 1909, and to cumulate therein the indexing for the entire year.

At the post-conference sessions held in St. Paul at the State Library, matters pertaining to the Index were discussed in detail, and certain indexing was completed which the editor in chief had been unable to finish by the co-operative method.

The American Law Review for May–June, 1908, contains a very curious article on 'The Pārājikas' (i. e. sins entailing excommunication, also the written commentaries on the definition of such sins) in Buddhist spiritual law. The contents of the books in question include, as might be expected, interpolations of many dates, but the learned author, Mr. Edward P. Buffet of New Jersey, who seems to be a competent Pāli scholar, thinks that in the main they go back to the fifth century B.C. As might also be expected, these Buddhist canons cover a great deal of what in the West is left to the civil law; thus we have an elaborate doctrine of theft presenting remarkable analogies and contrasts to the Common Law. *Nota* that a too exciting sermon may be an assault; this accords with some English mediaeval opinion, but not with the modern law, see 'The Circuiteers,' L. Q. R. i. 232.

The number of the Journal of the Society of Comparative Legislation published last month (vol. ix. pt. 1, N.S.) contains (*inter alia*) an address on the Society's work and prospects by Sir Courtenay

Ilbert, expositions of the new Indian Civil Procedure Code by Sir Lewis Tupper, and of the German statute on cheques by Dr. Ernest Schuster, an article on conflict of laws within the British Empire by Prof. Harrison Moore, and the judgments in a Ceylon case, shortly to come before the Judicial Committee, on the vexed question of *nudum pactum* in Roman-Dutch law, wherein the Supreme Court of Ceylon has refused to import the English doctrine of consideration.

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

REASON AND CONSCIENCE IN SIXTEENTH-CENTURY JURISPRUDENCE[1].

THE revival of European culture in the fifteenth and sixteenth centuries marks one of those critical epochs in history when all the possessions of mankind seem to be thrown into the crucible to be melted and cast into new shapes, when men feel the soil under their feet giving way, and yet rejoice in the hope of a bright future. The political and legal fabric of feudalism, the authority of the mediaeval Church, the comprehensive system of scholastic philosophy, were found equally wanting, and modern thought made its way in all spheres of life. Legal studies and legal institutions were not exempted from the effects of the general commotion. In Germany and in Scotland the law of the learned thrust national customs into the background for a long time. In Italy and in France a revision of the studies on which the law of the learned was based was started by humanistic lawyers—Alciat, Budée, and their followers. In England the imposing edifice of Common Law, a structure testifying in no less degree than Gothic cathedrals to the power of the mediaeval mind, was menaced by daring reformers ranged under the banner of 'equity.' There was talk of codification, of reception, of rationalizing the laws of England in accordance with the example of other civilized countries, under the guidance of a broadminded, constructive statesmanship[2]. Very curious evidence of this process of fermentation in the domain of English Law is supplied by two treatises of a lawyer of the Inner Temple, Christopher St. Germain. They were published as Dialogues between a Doctor of Divinity and a Student of the Laws of England in 1523 and in 1530[3], and evidently hit the mark. The cardinal question of the opposition between the Common Law Courts and Chancery called forth a lively discussion; the first Dialogue, originally published in Latin, had to be translated into English, the whole book was reprinted over and over again, quoted as an authority by Brooke and Coke, often referred to by Blackstone, by Spence, and by most modern authors who have written on

[1] A paper read at the Berlin Historical Congress, August, 1908.

[2] Maitland, English Law and the Renaissance, 41 ff.

[3] As to the publication of the first dialogue in 1523 we have to rely on the testimony of W. Herbert. No copies of that edition are known to exist. Cf. Dictionary of National Biography, art. St. Germain. I have used the Latin tract in Rastell's edition of 1528.

early English Equity. Not that the writer impresses one especially by personal acumen or literary perfection, but he is evidently quite at home in the legal learning of the Courts, and very well read in the philosophical and jurisprudential writings of his time. His scheme of putting before his readers in a kind of living opposition the ideas of an English lawyer and of a theologian versed in Canon Law was more than a passing happy thought, and it was carried out with considerable skill. One can hardly do better, in order to realize the conflict of legal ideas in the reigns of the early Tudors, than to study these tracts with some attention.

Before speaking of the contents I should like to mention that I have mostly gone back to the Latin version of the first Dialogue instead of referring to the English translation, as is currently done by modern writers. The recasting of the text for the English version by St. Germain may have been an improvement in some respects: it got rid of lengthy disquisitions and references and added a few developments on points of English Law. And yet, if we wish to understand how St. Germain came by his theoretical views, most valuable hints are supplied by the Latin version of the first Dialogue, as it puts clearly before us the elements of the author's learning and the threads which connect him with his predecessors.

A point which is made especially clear by the study of the first Dialogue in the Latin edition is that St. Germain started in the same way from scholastic philosophy and Canon Law as Bracton started from Roman Law in his time. Both writers wanted scientific distinctions and terms in order to tackle problems of English legal practice, and both began with a kind of reception of general notions which, however, was gradually modified by the treatment of concrete cases and questions. Azo was the interpreter of Civil Law for the thirteenth-century lawyer, John Gerson was the leading exponent of School doctrines for the sixteenth-century jurist. Stray references to the latter may be found even in the revised English text of St. Germain[1], but a comparison with the Latin Dialogue shows that, on nearly all occasions when theories had to be exposed, sentences and quotations were borrowed wholesale from Gerson's writings. A reader of the English version might be led, for instance, to assume that the reference to the philosopher's—that is, Aristotle's—teaching as to ἐπιείκεια (equity), testifies to a direct study of the Greek thinker's work. But the words of St. Germain are merely a repetition of some sentences in Gerson's Regulae morales,

[1] e. g. Dial. i. 3; ii. 55. In a dialogue between Salem and Bizance, treating of religious matters, St. Germain takes care to explain why 'the famous clèrke John Gerson did write in Latin.'

and, quaintly enough, in the Latin edition the term ἐπιείκεια appears in a garbled form suggested by Gerson's text, namely, *epikeia*[1]. 'A Iove principium': St. Germain's doctor naturally starts with a summary of the teaching on the Law eternal (*Lex aeterna*), the basis of the order of the Universe provided in God's mind[2], which, according to Gerson's nominalistic view, is established rather by the will than by the reason of the Creator. As the Latin text informs us: 'Lex eterna a Iohanne Gersone in descriptionibus terminorum ad theologiam utilium describitur sic: lex eterna est divina voluntas ordinativa rerum a sua arte producibilium sive productarum quoad operationes, et motus, et fines singularum[3].'

In the treatment of the second stage of legal generalities, namely, of *natural law*, we begin to notice national peculiarities. St. Germain's exposition closely corresponds in the main to scholastic patterns laid down by St. Thomas and expounded on several occasions[4] by Gerson. The law of nature may be taken in a wider and in a narrower sense. It is either the law of living beings, and the consequences of the well-known definition of Ulpian are drawn in the Latin text[5], or else—and this is the really important meaning—it is the conception of law of reasonable creatures, particularly of human beings. It is through the light of his own reason that man is made to participate in the eternal law formulated by the reason of God[6].

[1] Regulae morales (Opera, ii. f.): 'aequitas quam nominat philosophus *epikeiam* praeponderat iuris rigori. Est autem aequitas iustitia pensatis omnibus circumstanciis particularibus dulcore misericordiae temperata. Hoc intellexit qui dixit. "Ipsae autem leges cupiunt ut iure regantur." Et sapiens "Noli esse iustus nimis, alioquin summa iustitia summa iniustitia fit."' Cf. Latin dialogue, and Engl. version, i. 16. There are several instances of similar quotations from the 'philosopher' in the Latin text.

[2] Cf. Gierke, Iohannes Althusius, 272.

[3] The English version keeps the substance of the doctrine, but states it in a less scientific form, omitting the scholastic definition and one of Gerson's references to St. Augustine.

[4] Summa Theologiae, ii. 1, qu. 71, 6, 5; 91, 94. Cf. Gierke, Political Theories of the Middle Ages, transl. by Maitland, 172. Gerson was a nominalist and a follower of Occam, but his eclectic teaching supplied St. Germain with the elements of the Thomistic doctrine.

[5] Latin Dialogue, f. 7: 'Genus etiam suum conseruant, pullosque et fetus ex instinctu naturae nutriunt et contraria sui esse ex natura timent. Et secundum Iohannem Gerson lex naturalis animalium est lex illa quam habet quodlibet animal non impeditum nec indispositum.'

[6] f. 8: 'Lex vero naturae specialiter considerata respicit solum ad creaturam rationalem humanam ad ymaginem Dei creatam que a quibusdam etiam dicitur ius gentium. Nam inter omnes gentes servari debet tam inter iudeos et gentiles quam Christianos. Et hec est lex illa que inter peritos legis Anglie vocatur lex rationis. Quam etiam ratio naturalis constituit inter omnes homines, ita quod ad illam observandam inest instinctus communis omnibus hominibus. Et secundum Iohannem Gerson est signum naturaliter habitum notificativum recte rationis divine volentis creaturam rationalem humanam teneri seu ligari ad aliquod agendum vel non agendum pro consecutione finis sui naturalis qui est felicitas humana, seu monastica, seu yconomica, seu politica. Et sic lex rationis nihil aliud est quam participatio vel notio legis eterne in creatura rationali ei

Let us note a characteristic difference in terminology between the two versions of St. Germain's first Dialogue. The Latin tract has a fuller heading for the second chapter than the English editions: 'de lege rationis que inter doctores uocatur lex naturae rationalis creature siue *ius gentium*.' The last words are omitted in the English version and there is good cause for that, because, as it is explained in the fifth chapter, the *ius gentium* corresponds in truth only to two subdivisions of the law of reason, namely, to what is called the law of reason primary, prohibiting murder, perjury, deceit, allowing resistance to unjust power, and to the law of secondary reason taken in general, which sanctions property, contracts, &c. A third subdivision, which St. Germain calls the law of reason secondary particular, does not fit into the frame of the *ius gentium*, as understood by Roman jurisconsults and by the mediaeval jurists who followed them. The teaching as to that subdivision calls forth significant adjuncts on the part of our lawyer. In order to substantiate his view on the matter he has to leave the domain of scholastic generalities and to take examples from actual English rules, corresponding to what would be classified as *ius civile* in an analysis of Roman law. He cites, to begin with, the taking of distress, e. g. if a lord to whom his tenant fails to pay rent or to render service impounds animals belonging to the tenant in a pound overt, an enclosure known to the public, or if a landowner finds his neighbour's animals trespassing on his land. Doubtful points arise from this procedure: who is responsible for the feeding of the arrested animals and who has to bear the risk if they come to grief while impounded? The Student of the laws of England lets this question be decided by his interlocutor, the Doctor of Divinity, who comes successfully out of the trial. It is evident, he says, that the imprisoned beasts have to be fed by their owner and not by the person who has distrained, and it follows that, should they die, it is the owner of the animals that has to bear the loss—he should not have given occasion for distress. The Doctor of Divinity is made to solve the problem [1], because, according to the author's views, it is a problem of reasoning and therefore of reason [2]. That is why he does not mention it under the heading of *positive* (human) law, as one might have expected, but under that of law of reason secondary particular. The Latin text adds the remark that as the case can be treated on the strength of a reason-

revelate per lumen naturalis rationis, per quod habet naturalem inclinationem ad debitum actum et finem.' Cf. Gerson, Opera, ii. 191, 202.

[1] The doctrine as expounded by St. Germain in i. 5 and ii. 27 tallies exactly with pronouncements made by the judges, Y. B. 9 E. IV. p. 2; 5 H. VII. 9; 21 H. VII. 39.

[2] Cf. Pollock, Expansion of Common Law, 109 ff.

able construction of existing custom, there is no necessity for a written law about it[1]. A Continental lawyer might have been inclined to appeal to the *ratio scripta*, the *Corpus iuris*: not so the English barrister brought up on Common Law. The Latin version proceeds to give several other examples omitted in the English editions: the case of the flight of a person who has abjured the realm and escapes from the constables conducting him to a port; the derivation of the criminal treatment of robbery from a universally accepted principle of the secondary law of reason, while the distinction between theft as a capital offence and petty larceny is made out to be the product of national custom. We notice St. Germain as it were at the crossing of the roads: he justifies the dialectical operations of English Law by the notion of reason, or rather reasonableness.

There is a second thread of theory taken up by St. Germain which is even more important and suggestive for the understanding of the sixteenth-century crisis, namely, the teaching about conscience and equity. We tread here on ground where the Court of Chancery and the Ecclesiastical Courts were, as it were, pitted against the Common Law Tribunals. Long before the struggle of Coke against Ellesmere and Bacon, Common Law judges and barristers had realized the danger of their position in view of the encroachments of the Chancery. Fairfax, Huse, Fineux had delivered *dicta*, framed decisions, and suggested remedies with the direct intention of limiting the pretensions of the Chancellor and his powers of action. I need not dwell now on the facts of this struggle, which are in the main sufficiently known. Let us see, however, in what way our Dialogues reflect the principal contentions of the two parties, and whether any light is thrown by them on the momentous development of substantive law effected in the course and under the influence of this strife.

The Latin version of Doctor and Student is again helpful in so far as it shows the close dependence of the initial view of conscience and equity entertained by the author on the doctrines of fifteenth-century schoolmen. The definitions and explanations presented in the Dialogue are the undisputed property of the Doctor—that is, of the philosophical Canonist. The Student listens and agrees in deference to the ruling of his interlocutor. As for the sources of information of the Doctor himself, it is clear that his main authority is again Gerson, though when it comes to the discussion of special points of law and of the contrasts between the Canonist and Civilian doctrines, on one side, and those of English Common Law, on the

[1] Latin version, f. xxi. '*Studens*: recte iudicasti, sed quis te docuit nisi ratio fundata ex consuetudine predicta, *ita quod nec opus est aliquam legem scriptam haberi.*'

other, the Doctor takes council not only with Gerson's tracts, but with the fifteenth-century *Summae Confessorum*, more especially the *Summa Angelica* of Angelus Carletus and the *Summa Rosella* of Baptista de Salis [1]. These Summae are referred to repeatedly in the later parts of the second Dialogue on points in dispute between secular and ecclesiastical courts, but they have also been used in the earlier portions of the treatise without any distinct acknowledgment.

Anyhow, the Doctor begins his treatment of conscience as a source of legal decisions by a disquisition on that curious product of Christian thought on ancient philosophy—*Sinderisis* (συντήρησις [2]). The term looks queer enough in the purely English surroundings of the ordinary version of the Dialogue. The truncated sentences of the second chapter in the 1531 edition and in all the following are hardly sufficient to make it intelligible. The Latin edition, on the contrary, dwells at length on the notion, and takes its learning from J. Gerson's treatises. Gerson again followed closely St. Thomas Aquinas, who in turn took from Albertus Magnus, who was dependent directly or indirectly on St. Jerome [3]. What it comes to in substance is the admission of a power of discerning between good and evil and of inclining towards the good, apart from conscience proper, which deals with the subsumption of individual cases under the general rules laid down by Sinderisis and developed by reason.

It is not without significance to notice the scholastic frame of this general doctrine, because it clearly proves the importance attached by thinking lawyers of the stamp of St. Germain to the views of the Canonists. It is hardly likely that they should have pored over these intricate disquisitions merely for the sake of providing themselves with some ornamental scraps of learning. The question about their attitude assumes a special interest when we descend from the regions of speculative generalizations to the contradictory discussion of problems of actual law. This had to be done in the domain of equity, in which practical problems of law had to be treated in the light not of direct legal enactments or strictly applied maxims and precedents, but in the light of general theories.

As we have already seen, St. Germain's definition of equity is drawn through Gerson from Aristotle: equity comprises the guiding

[1] Stintzing, Geschichte der populären Litteratur des römisch-kanonischen Rechts, 533, 536.

[2] This transliteration follows the modern Greek pronunciation.

[3] Gerson, de natura primorum motuum, Opera, ii. 190. De mystica Theologia, Opera, iii. 163. Thomas Aquinas, Summa Theologiae, i. qu. 79, 12 ff. Albertus Magnus, Summa Theol., qu. 25, 2. Hieronymus, Commentary on Hezekiel, c. I. vv. 4–10. Cf. Siebeck, Archiv für Geschichte der Philosophie, ii, x. I wish to acknowledge my indebtedness to Mr. J. A. Smith, of Balliol College, for helpful suggestions on the subject of *συντήρησις*.

principles for the adaptation of general rules to particular cases, and especially to cases which transcend the rules in one way or another.

The Greek philosopher, however, did not specify from what particular sources such a guiding principle should be derived: he dwells rather on the necessity of taking into account all the complex circumstances of each single case. The Canon lawyers did discover a guiding rule in conscience, and it is important from the outset that in the jurisprudence of the English Courts of the time this principle came to be accepted on all sides—by Common lawyers as well as by Chancery lawyers—although there was much dispute as to the limits between the two spheres of law. As the point seems material to me, I should like to point out that in the thirteenth and fourteenth centuries, in the period of the early predominance of Common Law, equity, though specifically recognized and sometimes applied in practice, was taken in a wider sense, including justice and analogy[1]. However this may be, St. Germain formulates distinctly the proposition that equity excepts from law on grounds supplied by reason and conscience[2], and it is on the strength of conscience that remedies in equity were commonly granted.

The influence of Canon Law did not stop here, as it seems to me. Whatever the indistinct beginnings of equity jurisdiction may suggest, the Common lawyers of the fifteenth century joined the ecclesiastics seated in the Chancery in framing views about the administration of equity, which, though Decretals and Summae Confessorum were not quoted, strongly savoured of the principles and distinctions of Canon Law. The marked differences on particular points are hardly sufficient to obliterate the impression that we have to reckon not only with the stress of business requirements and with a spontaneous growth of English doctrines, but also with a process of indirect reception of Canon Law.

The lawyers and ecclesiastics employed in framing equity jurisprudence in the light of conscience were principally concerned with the application of three doctrines: equitable remedies had to be provided for those who had not understood how to avail themselves of their legal rights; transactions based on confidence should be protected; promises of parties to contracts should be enforced in certain cases, even if the ordinary legal formalities had not been complied with. There were other points about the equity jurisdic-

[1] Bracton, f. 12 v: 'de aequitate tamen per officium iusticiariorum tenebitur eidem firmario propter fraudem.' Cf. f. 178, Y. B. 2 E. II (Seld. Soc.), p. 57: 'racione equitatis quia petens non habuit dampnum de detencione.' Cf. Stat. of Gloucester, c. 11: 'en mesme la manere seit fet de equite en tel cas deuant justices avaunt le judgement.'

[2] Doctor and Stud., i. 16.]

tion of the Chancery—for example, the greater laxity as to certainty of claims, the putting down of maintenance, discovery in procedure, &c.—but they proceeded from other points of view than that of conscience, and it is to the latter only that we have to attend.

I may be allowed to refer to a few cases and Chancery documents which, when studied in conjunction with the text of Doctor and Student, illustrate the application of conscience in the equity Courts in the fifteenth and the beginning of the sixteenth centuries.

In a case tried in Chancery in 1467 (Y. B. P. 8 Edw. IV, f. 4, 11 pl.), Genney, counsel for the defendant, tried to argue that the plaintiff had not taken care to follow the prescribed rules as to covenants, and, if he suffered thereby, it was through his own folly. The Chancellor, Bishop Stillington, granted a subpoena, and justified his action in the matter by the characteristic maxim: *Deus est procurator fatuorum* (the Year Book as printed gives *futurorum*, which is clearly an error): God acts as attorney to foolish people. The maxim bears the stamp of rough and ready mediaeval clericalism, and it opened the way for the Chancery to look behind the external regularity of all sorts of transactions with a view to the redress of wrongs committed by skilful miscreants who had taken advantage of weakness of intellect, insufficient knowledge, or casual negligence[1].

In St. Germain's Dialogue the doctrine comes to be applied in connexion with the case of a debtor who pays his creditor and does not take a receipt or loses it (i. 12). The Doctor assumes on the strength of Canon Law that the absence of the receipt does not deprive the debtor of all remedies: proof of the payment by witnesses may be accepted. The Student follows very closely the pronouncement of C. J. Fairfax in 22 Edw. IV. In a conference with Chancellor Rotheram, the Chief Justice maintained[2] that it would be the subversion of all Law if it were possible for two witnesses to upset matter of record, which in this case was the record of a debt incurred before a mayor under Statute Merchant. St. Germain gives the view a wider meaning, and argues that as debts are contracted in writing they ought to be discharged in writing. Law ought only to look to the majority of instances, and not to the interests of single individuals who were suffering through their own folly. But, having said so much, the exponent of English Law makes a distinct reservation in regard to possible exceptions, and admits the application of the subpoena to such cases, a concession bitterly resented by Common lawyers, as is shown by the

[1] Cf. Calendar of Chancery Proceedings, i, p. xlv, *Pope* v. *Goodbern*; iii, p. lxx, *Box* v. *Bank*. [The argument 'this is a covenant if it is anything, and covenant must be by deed' is familiar in the early cases on assumpsit.]

[2] Y. B. 22 E. IV, f. 6.

criticisms of a Sergeant-at-Law in the pamphlet published by Hargrave.

The second great group of cases ruled by the jurisdiction of conscience is supplied by contentions as to breaches of trust or confidence. These include, of course, the exceedingly important and numerous cases turning on the practice of uses. I need not go into details on this question, as the subject has been repeatedly and successfully discussed by others[1]. The only point on which I should like to insist for a moment is a fact which is sometimes apt to be thrust into the background by the investigation of special branches. Towards the close of the fifteenth century it was clearly realized by lawyers that the exceptional remedies granted by the Chancery were not considered merely as expedients arranged in order to make land devisable by will or to provide securities for the fulfilment of certain agreements, but depended on a general view as to the legally binding effects of confidence. I may be permitted to refer to the case of *Rede* v. *Capel*[2]. In the course of the pleadings Chancellor Morton came to point out several typical examples of the interference of Chancery in matters where Common Law failed to give remedy. Counsel for the defendant, Mordaunt, very properly generalized all these instances; he remarked that the ground for the interference of the Chancery in such cases was that they were all mixed up with 'confidence,' and the Chancellor did not contradict him, but put in one or more examples in order to widen the application of Equity remedies. Now breach of confidence goes clearly back to the *Fidei laesio* which ecclesiastical tribunals had claimed as their province[3].

The third group of cases which might be discussed from the point of view of Conscience is formed by *parol* agreements, formless contracts. The history of this kind of obligations in English Law has given rise to much discussion. Their roots have been sought in a peculiarly English doctrine of *quid pro quo*, in an extension of the Roman *causa*, in the cross-influences of business requirements and judge-made Law, as exemplified by the rise of the action of 'assumpsit,' &c. I should like to submit some observations suggested by a close comparison of St. Germain's statements on the subject with significant Year-Book cases. It seems to me that in this matter as well as in the treatment of uses theoretical influences have to be taken into account by the side of business considerations.

Let us note, to begin with, that in his statement of the Canonist

[1] I need not quote the well-known books of Gilbert, Spence, O. W. Holmes, Sir F. Pollock, Kerly, &c. A valuable selection of standard documents is given by Baildon in the Selden Society volume on Early Chancery Proceedings.

[2] Y. B. P. 7 H. VII, pl. 2, f. 12. Cf. Salmond, Law Quart. Rev. iii. 178.

[3] Sir E. Fry, on *fidei laesio* and specific performance, Law Quart. Rev. v. 235.

doctrine as to promises St. Germain closely follows the *Summa* of Angelus Carletus. I will just quote the exposition of the latter in order to show to what relation the speech of the Doctor in ii. 24 stands to the title *Pactum* in the *Summa Angelica.*

'Utrum ex nudo pacto sive ex sola promissione homo obligetur? *Resp.* quod de iure canonico et in consciencia sic, sub pena mortalis peccati ut no. in c. I de pactis et . . . quando exprimitur causa, ut promitto tibi X quia vendidisti mihi talem rem, vel mutuo concessisti, et huiusmodi. Quia si sit nudum sic quod nulla causa est adiecta, non obligat etiam in consciencia. Ratio quia presumitur per errorem promisisse. . . . Adverte tamen quod si quis dixit—promitto tibi centum donare, quod tunc liberalitas promissionis presumitur causa donandi, et sic non est sine causa. Similiter si promittitur aliquid loco pio, quia presumitur obligasse se favore pie cause nec presumitur ibi error. . . . Nemo ex quacumque causa obligatur nisi qui habuit animum obligandi se. Non tenetur sub pena mortalis peccati ad pactum nudum servandum nisi subesset causa que ad hoc obligaret de necessitate precepti, puta promisi patri meo vestem qui moritur ex frigore, quia tenetur quamvis non habuerit animum obligandi se. Datur tertia limitatio, scilicet si conditio vel rationabilis causa non advenit postea, que si a principio affuisset, non promisisset.'

We thus find St. Germain's mention of 'consideration[1],' as a necessary basis for the validity of a promise in Canon Law, directly derived from the teaching of later Canonists as to *causa*, and characteristic developments and limitations may be found in the same way in both texts. They may be summed up under the following heads: (1) the promise must be intentional; (2) it is subject to be taken back in consequence of a material change of circumstances; (3) it must have a reasonable cause, which may consist either in a material equivalent or in moral considerations; (4) a liberal disposition is to be deemed a sufficient cause in the case of gifts; (5) promises to moral persons, to political, learned, or religious bodies are legally valid if they are made for the sake of their moral aims, e.g. for the honour of God, the advancement of learning, assistance of the poor, and the like.

Now, when the turn comes for the Student of the Laws of England to state the Law on his side, he disagrees with some of the particulars put forward by the Doctor, but remains in touch with him on other important points of the latter's analysis. He does not want to have anything to do with the search for intention—let the Church manage that, if it can—*in foro conscientiae.* He does not enter into the interesting question as to the value of a precedent moral duty

[1] Pollock, Principles of Contract, 7 ed., 172 ff.

in establishing the legality of a promise. He does not admit the privileged position of learned, religious, and other moral bodies in comparison with common persons. But on that very delicate point he lays down the English legal view in such a way that a reasonably wide scope is opened for promises made for the sake of religion, charity, enlightenment, or public interest. If the promisor imposes a specific duty on the promisee, the promise will stand and give rise to an action even should the promisor not derive any personal benefit on his side. If *A* promises *B* to give him £20 if he fasts through Lent, and *B* does fast, the promise will be valid. This seems an important admission of the Student. Together with the view that there is no difference between corporations and common persons in respect of promises made to them, it leads to a further step in the development of doctrine.

I mean the view formulated by St. Germain in the following words: 'if he to whom the promise is made have a charge by reason of the promise, which he has also performed, then in that case he shall have an action for that thing that was promised' (ii. 24; Muchall's edition, p. 177). This passage has been taken to show how actions originally conceived in tort came to be regarded as actions *ex contractu*, but the context of St. Germain's teaching points rather to the conclusion that the treatment on the ground of contract was brought about by an analysis of gifts to charitable and similar institutions.

I do not want in the least to contest the importance of Professor Ames's remarkable study of the early history of 'assumpsit[1].' But I wish to call attention to one more element of the doctrine of informal agreements, namely, to the treatment of promises made with a view to further some general interest and in which therefore the personal 'consideration' or advantage to the promisor resolves itself into the satisfaction of his zeal for one or the other moral object. Canon Law accepted the proof of the existence of such a moral object as a sufficient *causa* in itself, English Law demanded a specific charge on the part of the promisee to make the promise valid and actionable, but in both cases the question arose from an analysis of the conditions of an implied contract. The Law sounds of contract and not of tort in this particular direction, and the English theory seems to be concretely allied to the Canon one, though stopping short of the latter.

Traces of an analysis of parol agreements from a similar point of view are still perceivable in some of the reported fifteenth-century cases. In 1429 the Common Pleas had to consider an action on the

[1] J. B. Ames, History of Assumpsit, Harvard Law Rev. ii. 15.

case[1] against a millwright for non-performance of a promise to build a mill by a certain day. The judges proceeded, among other things, to examine the question whether the millwright was to be held bound by an undertaking to which there was no corresponding promise of recompense. The bargain was held to be void because there was no express mention of a recompense for the labour. This view would have satisfied not only the English but also the Canon Law, but it seems to imply, on the other hand, that a parol agreement with promises on both sides would be binding for both parties, though it was not actually decided till long afterwards that mutual promises could be a good consideration for one another. We deal in this report with an *action on the case*, but there was a constant tendency on the part of the Common Law Courts to develop the action on the case as a substitute for Chancery remedies[2]. No wonder that the Chancellors were entertaining similar cases in their Court on the ground of conscience. Stillington's declaration in this respect[3] and the often-quoted statement of the 'Diversité de courts[4]' are conclusive testimony on the subject, and there is some evidence to show that the practice of Chancery in this matter was prepared by local usage[5]. It is only to be regretted that we should be so insufficiently informed as to the early proceedings in Chancery in consequence of the fact that it was not deemed a Court of record as to equity matters.

It seems to me on the whole that a study of St. Germain's Dialogues shows conclusively what a stimulating influence was exerted on the English jurisprudence of the fifteenth and sixteenth centuries by the later schoolmen and Canon lawyers. Henry VIII and the Reformation put an end to Canon Law in England, but the process described by St. Germain had not taken place in vain: it left distinct traces in the theory and jurisdiction of English equity.

PAUL VINOGRADOFF.

[1] The case (Brooke, Abr. Action on the Case, 7) is generally quoted as 3 H. VI. 36, and it is entered under this term in Tottell's edition. But the text of the Year Book itself speaks of 'anno regni regis H. VI octavo,' and the names of the judges fit into the later date. It seems, also, that the case was tried in the Common Pleas, and not in the King's Bench, as Brooke supposed. [If 'Strange,' the plaintiff's counsel, is the Strangways who was appointed a justice of the C. P. in 4 Hen. VI, A.D. 1426, the earlier date seems to be right.]

[2] Y. B. 21 E. IV. 23.

[3] Y. B. 8 E. IV. 4, pl. 11.

[4] Kerly, On Equity, 86.

[5] *Mans* v. *John Aklum and another*, Cal. Ch. Pr. i, p. xli (13 Sept. 13 H. VI): 'the said bailiffs of Scarborough in the recorde of the said plee have made entre that afor the tyme of mynde it hath been used in the same town bi the custume then used and approved, plaints of covenant to be maintenable withynne the said town as well upon covenants made by worde only as by writing at the commune lawe betwix any personnes sealed under their seals.'

MARITIME SALVAGE AND CHARTERED FREIGHT.

IN the April number of this journal Mr. Birch Sharpe stated and discussed the following proposition:

'When a ship under charter proceeding in ballast to an outward port, there to load and bring back a specified cargo, is rescued from danger under circumstances which entitle her rescuer to rank as a salvor in the courts of this country, can the salvor make good a claim for remuneration in respect of the freight then in course of being earned under the charter-party?'

and he arrived at the conclusion that chartered freight under such circumstances is not a subject of maritime salvage.

The relations of chartered freight to salvage and general average have excited a good deal of interest of late years in circles where such questions have to be considered, determined, and given practical effect to by means of financial settlements between conflicting interests; and it is probable that in those circles the question, in the simple form set forth above, would by a considerable majority be regarded as already concluded on the authority of the case of 'the *Progress*' (1810)[1] referred to on p. 210 of the April number. Mr. Birch Sharpe takes note of that case, but apparently is of opinion, not so much that there is no analogy to be drawn between it and the case propounded by himself, but that his case differs from the *Progress* case fundamentally. It will probably be convenient here to summarize the circumstances of the hypothetical case as stated in the April number.

The vessel is proceeding in ballast under charter to the Gulf of Mexico to load a cargo of grain for this country, freight being payable only on right delivery of the cargo. While proceeding down the Channel on her outward journey she loses her rudder, and is towed into Plymouth. The salvors claim salvage on the vessel and on her chartered freight, and arrest the vessel. Bail is given, the vessel is repaired and proceeds on her voyage. An action in the Admiralty Court is instituted for the recovery of salvage on the vessel and on her chartered freight.

Now the circumstances of the *Progress* case have to be gathered from the judgment itself, and they are not altogether clear.

In 1809 merchandise was lying at Oporto ready to be conveyed to England. For that purpose certain vessels (amongst them the

[1] 1 Edw. Adm. R. 218.

Progress) were chartered to proceed to Oporto in ballast, and there load and convey cargoes of this merchandise to England, one freight for the entire out and home voyage being payable on delivery in England. Other vessels were engaged for the same purpose at Oporto. While lying at Oporto that place was captured by the French. At the time of capture some cargo had certainly been already loaded on some (or all) of the vessels. The French, having seized the vessels, relanded and warehoused some (or all) of the goods on board them. While things were in that position the place was recaptured by the British and Portuguese troops. The vessels then loaded (or reloaded) their cargoes, and arrived with them in England. Military salvage was claimed on the ships and cargoes, and also on the freights of those vessels which had been chartered to proceed from England in ballast to Oporto to load. It will be seen that, as regards the *Progress* herself, it is impossible to say whether, at the time of recapture, she was still in ballast, or whether she had cargo on board, or whether, having had cargo on board, it had been relanded by the French. But this point appears to have had no bearing upon Lord Stowell's decision, for the learned judge allowed salvage on the freight of the vessels chartered from England, and disallowed it on the freight of the vessels taken up at Oporto, on the ground, as will be seen from the following extract, that the freight-earning voyage of the former began when the vessels left England, while the freight-earning voyage of the latter had not yet commenced:

'As to the freights of the vessels that were taken up at Oporto, no salvage is asked upon them, and certainly it could not have been contended that any would be due, as the voyage had not commenced. But these vessels, which had gone to Oporto from this country under a charter party for one entire voyage out and home, and had already performed the outward voyage, were in the course of earning their freights at the time of capture: they had actually broke ground, as the phrase is, and had entered upon that adventure out of which their profits were to arise. While lying in the harbour of Oporto they were in the course of earning their freights; they were in itinere, and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charter parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect, but where a ship goes out under a charter party to proceed to her destination in ballast, and to receive her freight only upon her return, the Court is not in the habit of dividing the salvage.'

In the *Carisbrook*[1] case a vessel proceeding in ballast under

[1] *The Carisbrook SS. Co.* v. *The London and Provincial Mar. Ins. Co.* (1902) 9 Asp. 332.

charter to load a cargo made certain general average sacrifices before reaching the loading port. The average adjuster in dealing with these sacrifices had charged the entire cost of them to the ship. The ship underwriters contended that contribution was due from the chartered freight; and Lord Justice Collins, in adopting this view, referred to the case of the *Progress* as authority on the point. He said, after pointing out the analogy between salvage and general average as regards the interests to contribute:

'It seems to me that Lord Stowell in the *Progress* had practically the same question as the average adjuster has in this case, and it (i.e. the *Progress* case) is clear authority in principle that in the case of a round voyage under such conditions as these (i.e. the vessel in ballast under charter) where the freight is only payable on the ultimate arrival of the ship with its cargo on board, that freight is a contributory factor.'

In the *Orpheus*[1] case the vessel was proceeding from Liverpool to Viborg to load deals for Grimsby under a charter-party. She had liberty to take an outward cargo and did so. In the course of the outward voyage she collided with and damaged the *Emilia*. To secure their claim against the *Orpheus* the owners of the *Emilia* arrested her on her return to Grimsby, and also arrested the cargo of deals for the chartered freight. These deals, it will be remembered, were not on board at the time of the collision. On a motion to have this freight released, on the ground that freight is only liable when it is being earned in respect of cargo on board at the time of the collision, Sir R. J. Phillimore, rejecting the motion, said:

'As I read the charter-party which relates to the deals, I am of opinion that freight was growing due on their account although they were not on board at the time of the collision.'

In the case of the *Norma*[2] the vessel was proceeding from Honduras to England with a cargo. Salvage services were rendered to her when in distress, and she was carried into Bermuda. The master declined to give the bond asked for by the salvors, and the matter being referred to England, security was given there; the vessel was released, and after repair proceeded on her voyage. In the salvage action it was contended that no salvage was due on the freight on the ground that, at the time of the salvage service, no freight had been earned, freight being payable only on the delivery of the cargo in England. The learned judge, after pointing out that the proper value on which to assess the salvage award is the

[1] The *Orpheus* (1871) 3 Asp. O.S. 531; 40 L. J. Adm. 24.
[2] The *Norma* (1860) Lush. 124.

value at the place where the service of the salvor terminates, proceeded:

'Now it is certainly quite true that at Bermuda, as between the owner of the ship and the shipper of goods, no freight was earned. But I do not think that is at all conclusive against the salvor. . . . In salvage we have to decide on purely equitable principles, and the question here is not so much what freight was earned at Bermuda but what services in respect of the contract of freight the salvors had then rendered.'

These cases seem to the present writer to establish the following propositions:

(*a*) The freight-earning voyage of a vessel chartered to proceed in ballast to a loading port and thence to carry cargo commences as soon as the vessel breaks ground to proceed in ballast to her loading port. (The *Progress* and *Carisbrook* cases.)

(*b*) Chartered freight payable only on right delivery of the cargo is, while the vessel is proceeding to her loading port, though not yet earned, an element of value to the shipowner which the Courts will recognize and deal with. (The *Orpheus.*)

(*c*) Salvage is granted by the Courts on freight not yet earned, based on its value *to the shipowner* at the moment when the salvage service terminates, without reference to the question whether the freight is or is not subsequently earned. (The *Norma.*)

If these three propositions are correct, the proper answer to the salvor, it is submitted, would be that chartered freight under the circumstances named *is* a subject of maritime salvage. From this point of view it is unnecessary to deal with the many other very interesting and very debatable questions raised in the article in the April number; but to two of them a short reference may be permitted.

1. On p. 208 Mr. Birch Sharpe speaks of the freight in question as 'freight admittedly being earned though as yet non-existent', with the natural inference that a salvage award cannot be asked for on a thing which does not exist. But is the freight 'non-existent'? Either it is 'existent' to the shipowner, in the case put, from the moment the ship commences her voyage in ballast, or it is 'non-existent' up to the moment preceding the delivery of the cargo to the consignee, with this result that, in the latter alternative, salvage is awarded every year in scores of cases on 'non-existent' freights; for between these two points of time the nature of the shipowner's right to freight remains the same. It is a right to earn an agreed sum by carrying and *delivering* an agreed cargo.

Taking the cargo on board does not alter the nature of this right or make the freight 'existent' when before it was 'non-existent,' though possession of the cargo may give the shipowner, under the terms of the charter-party, greater security for the payment of his freight.

2. On the same page the writer asks, 'What is the value of a ship?' The following does not profess to be an exhaustive definition of what the value of a ship represents, but is rather an attempt to show the main considerations on which the market value of a ship, when used for the ordinary purposes of shipowning, must be based.

A ship is an investment of capital. The owner buys her to secure from the freights she will earn, first, a fair return on the sum he has invested in buying and working her, and, secondly, a further amount to replace the loss of capital arising from the regular and natural decay of his vessel. From the moment when he converts his capital into ship, he begins by means of freights to reconvert his ship into capital, until, the time arriving when his ship is worn out, he has once more his capital in hand and has in the meantime received a fair return on the capital invested. Thus the market value of a ship at any moment represents the sum of all the net freights she may reasonably be expected to earn, plus her value at the end for old material, but less a reasonable interest on the capital invested in buying and working her; and the freight which, at the commencement of any adventure, she is proceeding to earn is just as much a part of her value at that moment as any of the reasonably contemplated subsequent freights. But for purposes of insurance the law directs that a distinction shall be drawn between a freight in course of being earned and the many subsequent average freights which go to make her market value, and the former must be separately insured.

There is nothing original in the view of a ship's value here presented. It is substantially the view held by many writers on shipping and insurance subjects, and amongst them by Lowndes, whose definition is criticized, but hardly seriously shaken, by Mr. Birch Sharpe. For all that Lowndes has omitted to take account of in his definition is the fact that the shipowner will not use his capital or his labour for nothing, but will expect the freights to recoup him, not only the capital sum invested, but also a reasonable return on the labour and capital involved. This omission does not seem to touch the central principle that the value of the machine is dependent on the money it will earn. *The Sea Insurance Co.* v. *Hadden*[1] and *Hickie* v. *Rodocanachi*[2] do not conflict with this view. They deal with questions of Marine Insurance law, and the doctrine of

[1] *The Sea Insurance Co.* v. *Hadden* (1884) 5 Asp. 230, 53 L. J. Q. B. 252.
[2] *Hickie* v. *Rodocanachi* (1859) 28 L. J. Ex. 273.

that law with regard to the insurance of freight in course of being earned has been already referred to.

But it is probable that the question of chartered freight's liability for salvage seldom arises in the simple form we have been hitherto discussing. It is more commonly in connexion with the shipowner's attempt to recover from his insurers the amount he has paid to the salvors that differences of opinion present themselves.

We will assume that, in the case put, the shipowner has insured both his vessel and his chartered freight. If the salvor has asked for and obtained from the Court a definite award in respect of the freight no difficulty, of course, arises. But suppose that the question of the freight's liability, as distinct from the ship's, has not been before the Court at all, or even that the entire settlement has been amicably arranged out of Court between salvor and shipowner. Let us assume that the value of the salved vessel at Plymouth in a sound condition has been agreed at say £18,000, and the amount to be paid to the salvor also agreed at say £1,800. If now the shipowner asks his ship underwriters to pay the whole of the £1,800, he will probably be told that his chartered freight must pay a portion of it; in other words, that the salvage payment £1,800 must be apportioned between the ship and the chartered freight, and thus recovered on the ship and freight policies. Is this right? It is certainly the present practice of average adjusters so to treat the matter.

Let us assume that at Plymouth, at the time when the ship in the supposed case (we will call her ship *A*) was carried in by the salvors, there was lying a sister ship *B*, similar in age, build, upkeep—in every respect. Further, that the £18,000 agreed on with the salvors as the value of ship *A* is the value at which the owner would be willing to sell each ship, *A* and *B*. Let us also assume that there is a purchaser in the market of two ships such as these, who is willing to give the £18,000 for each for immediate delivery.

Now ship *A* will not be back from Mexico with her cargo for four months. The purchaser will give £18,000 for her if he can have her at once, or if he can have her at the end of four months together with the net freight she is earning. Otherwise, for possession only after four months, he will give, and the shipowner will take, £17,000.

Is it not clear that the difference between what he gives for *B* the free ship now, and what he gives for *A* at the end of the four months, represents the net value of the freight ship *A* is in course of earning?

Thus then the £1,800 paid to the salvors represents the value of

their services to what by law we must regard as two separate interests, the ship and the freight she is earning; and since the law of Marine Insurance does not allow the shipowner to recover a loss of freight, nor presumably money paid to avert a loss of freight, on his policy on ship, a portion of the salvage award must be charged to the policy on chartered freight, and *The Sea Insurance Co.* v. *Hadden* is strong authority on this point if authority were needed.

It is submitted then that, even where the chartered freight is not definitely considered in the salvage settlement, it must, under the circumstances of the supposed case, contribute to the award.

As to the proper method of calculating the values on which this contribution should be made nothing is said here. The present method appears to work satisfactorily, though it would probably be possible to bring it more closely into line with the doctrines of Salvage Law. However that may be, the necessity and justice of some contribution between the two interests seems to the present writer to be clear.

M. A. RUNDELL.

TWO PROBLEMS IN LEGAL HISTORY.

'HOW and when did the Courts begin to recognize the qualifications of a Barrister of the Inn to practise before them? And why did the appellation of Barrister entirely supersede that of Apprentice?' asks the learned Prefacer of the printed transcript of the Black Books of Lincoln's Inn; and the Black Books, he adds, furnish no answer; though the Black Books of Lincoln's Inn carry us further back into the past than do the records of any other Inn of Court. In the following pages some attempt is made to discover an answer to these questions.

Exactly how and when the Inns of Court acquired the privilege of investing their duly qualified members with the right—to-day the exclusive right—of audience in the High Court is a story which has in part perished from sheer age as a plain story in consecutive chapters; and we can only attempt to piece together such fragments of it as we can still identify, and then try to infer the lost facts from those which we still possess.

In the beginning of things we find the Serjeants in exclusive possession of the right of audience. It is not to our purpose here to deal with the history of the most ancient and illustrious Order of the Coif, who assumed their office and acquired their privileges by direct writ from the Sovereign. From one cause and another, which we need not stay now to discuss, but mainly, one gathers, in consequence of the royal mandate ordering the Court of Common Pleas to remain stationary at Westminster, instead of, as heretofore, perambulating the country in attendance upon the King's person, and the disinclination of the Serjeants to absent themselves from it, considerable inconvenience seems to have been caused in the latter half of the thirteenth century by reason of the number of Serjeants still attending the King's Court in its perambulations about the country being insufficient for the satisfactory administration of justice. The dignity of Serjeant was too great for new Serjeants to be created in large numbers; and even a large creation of them would not necessarily have ensured a sufficient attendance of them in the perambulatory King's Court. Some other course, therefore, had to be taken. And this is what happened. In the Parliament Rolls of Edward I[1] occurs the following: 'De attornatis et apprenticiis, dominus rex iniunxit J. de Mettingham[2] et sociis

[1] 20 Edw. I (1292), 1 Rot. Parl. 84. [2] C. J. of the Court of Common Pleas.

suis, quod ipsi, per eorum discretionem, provideant et ordinent certum numerum, de quolibet comitatu, de melioribus et dignioribus et libentius addiscentibus, secundum quod intellexerint quod curiae suae et populo de regno melius valere poterit, et maius commodum fuerit. Et quod ipsi quos ad hoc elegerint curiam sequantur, et se de negotiis in eadem curia intromittant et alii non.'

The first comment one may make upon this is that it is not only an order by the Sovereign, but it is an Act by the Parliament; it is in the Parliament Rolls, and under the authority of Parliament.

Now who were these apprenticii? To answer this question satisfactorily seems now impossible; and we cannot stay to discuss it adequately here and now. But one must say something about them. The above-quoted statute gives us, I believe, the earliest extant instance of the use of the word in this connexion; and its occurrence here, without any kind of explanation, seems to prove that these apprentices were then a well-known and well-defined body of persons. In the present state of our knowledge, or lack of knowledge, it is now quite impossible to say with certainty exactly what these 'apprenticii' of the thirteenth century were. It may very well have been (and for this suggestion I am indebted to my friend Mr. Paley Baildon) that an 'apprenticius' was a pupil under some sort of articles, expressed or understood, to a Serjeant. The Serjeants had necessarily to be recruited from some source; from some class of men who had from some system of training and teaching, and from some means of experience, acquired a sufficient knowledge of law and practice to enable them, when summoned in due course by the King's Writ to do so, to take up the office of Serjeant with a reasonably assured ability to fulfil its duties and responsibilities. It seems certain that at the time we are speaking of there were no organized law schools in England; no public system of legal training. The only way, apparently, in which a young man, intending to make the law his profession, and hoping in due time to be created a Serjeant, and thus to have opened to him the then only avenue to actual practice, could gain the necessary equipment and qualifications was by attaching himself to some one who was able and willing to teach him; and this could seemingly have been only a Serjeant. And the very word apprentice, too, seems to infer a definite master and teacher. But as to the conditions or terms of the apprenticeship, if, indeed, definite apprenticeship to a definite master there were, we know nothing. All we know is that at the time we are speaking of there was a class of men, not privileged to practise in the Courts, but of whom a number were presumably sufficiently equipped in matters of law and practice to be capable of practising there with credit to themselves, and with advantage to the suitors using the

Courts; and from these adequately equipped apprentices the Statute of Edward I authorized the Judges to choose from time to time, as occasion required, for admission to practise in the King's Court, so many as in their opinion should be necessary for the adequate administration of justice. And upon those so chosen by the Judges the right of audience in the King's Court was conferred; upon them—and the Serjeants, of course—and upon no others.

This was in the King's Court only, and its subdivisions. In the Common Pleas the Serjeants retained the exclusive right of audience, with the short interregnum of chaos caused by the Warrant of William IV of April 24, 1834, till the passing of 9 & 10 Vict. cap. 54 (August 18, 1846).

The point at which we have now arrived is this—a clear authority from Sovereign and Parliament conferring upon the Judges the exclusive right—to use our modern phraseology—of calling to the Bar. This right has never been taken away from the Judges, and has never been conferred upon any one else, and must, therefore, however latently in appearance, still remain in them. But what we actually see, or seem to see, to-day is the four Inns of Court, and not the Judges, in the exclusive possession of the right to call. How does this come about? What is the origin of the Inns of Court, and what is the origin of their apparent exclusive possession to-day of the right to call to the Bar? The origin of the Inns of Court can only be glanced at here. They are subsequent, one may say with reasonable confidence, to the Statute of Edward I. Their first beginnings were probably made by the earliest apprentices who were admitted to the right of audience by the Judges under the authority given to them by this Statute, and probably by the advice and under the sanction and encouragement of the Judges. Anyhow, the Inns of Court came into being; and however and whenever they came into being they were the creation of private persons. Neither King nor Parliament had anything to do with their foundation. Neither King nor Parliament has ever conferred upon them any privileges or authority. Purely private societies they were at the first, and purely private societies they have remained ever since. 'The original institution of the Inns of Court,' said Lord Mansfield, 'nowhere precisely appears, but it is certain that they are not corporations, and have no constitution by charters from the Crown. They are voluntary societies [1].' 'The Inns of Court,' said Lord Campbell when Attorney-General, 'are merely voluntary societies. They were originally dining clubs and nothing more, like the clubs established at the west end of the town [2].'

[1] *The King* v. *Benchers of Gray's Inn.* Douglas's Reports, vol. i, p. 354.
[2] *The Serjeants'* case, reported by Serjeant Manning (London, 1840), p. 140.

Mere private societies; dining clubs, and nothing more; and yet, as all men know, to-day in the exclusive possession of authority to confer the right of audience in the higher Courts of the land. How is the paradox to be explained? We must get back again to the days of the Statute of Edward I. No doubt the Judges discussed it with the Serjeants, and the Serjeants with the (or their) apprentices. There were going to be openings for a much larger number of apprentices than ever before, when an apprentice could only hope to be admitted to actual practice in the Courts by being created a Serjeant; and Serjeants were few, and not made every day. And as there would be openings and opportunities for more apprentices, so there must be a larger provision of adequately equipped ones than had hitherto been necessary. How could that larger provision be supplied? One can imagine the Judges and Serjeants and graver apprentices discussing these matters, and making this suggestion and that. Wise in our knowledge of the course and development of legal history, we can confidently guess at the conclusions at which they arrived. The apprentices must form themselves into schools or organizations for the study of the law in such ways as the Judges should direct and approve of. The Judges themselves were too busy to be able to superintend personally the education of the apprentices in law and practice, and to satisfy themselves of the sufficiency of their professional equipment, but if the apprentices would conform themselves with the desires and regulations of the Judges, why then the Judges would leave the selection of apprentices to be granted the right of audience to the governors—the Benchers we call them to-day—of what were going to grow into the four Inns of Court. The Benchers should choose them, and the Judges would accept them; and, by accepting them, confer upon them the right of audience, and so admit them to the Bar. 'The Judges,' said Lord Campbell, when Attorney-General, 'deputed to the Benchers of the Societies the task of giving lectures, and examining into the sufficiency of the candidates, and of calling them to the Bar, but they are still mere voluntary societies; and they act by the authority which the Judges have delegated to them[1].' And again, 'The Benchers of the Inns of Court are only the agents of the Judges in calling to the Bar. It is a power committed to them by the Judges, a power which the Judges may resume[2].'

'All the power they (i. e. the Inns of Court) have,' says Lord Mansfield, 'concerning the admission to the Bar is delegated to them from the Judges, and, in every instance, their conduct is subject to

[1] *The Serjeants'* case, p. 140.

[2] *The Serjeants'* case, p. 139.

their control as visitors. This will appear from a great variety of instances of orders made at different periods, for the regulation of those Societies, which are to be found in Dugdale's "Origines Juridiciales"[1].'

Every trace of the original concordat, if indeed it were ever reduced to writing, between the Judges and the first founders of the Inns of Court has disappeared, but that there must have been one seems certain when we reflect that these societies, 'originally dining clubs, and nothing more,' according to Lord Campbell, have to all intents and purposes acquired the exclusive right of calling to the Bar; and that, being purely private voluntary societies, they have, all through the course of their existence submitted to receive and obey orders from the Judges concerning all sorts of subjects, orders which it is quite inconceivable that any purely private societies would have tolerated unless they were receiving at the same time a very substantial and adequate *quid pro quo*. The Judges said, in effect, all through the history of the Inns of Court: 'Carry out our wishes, and we will continue you as our deputies in this matter of calling to the Bar'; and the Inns carried out the Judges' orders, so long as the Judges remembered them, or appeared to remember them, and so long as the Inns found it convenient to carry them out, but if it became inconvenient and the Judges' memory might be presumed to have grown dull, they quietly dropped them. Indeed, one can hardly help thinking sometimes that the Judges of earlier days now and again deliberately tried to see how far they could go in their interference with the Inns without making them, like the worm of the proverb, 'turn'; that they looked upon them as a sort of Patient Grizel whose endurance was to be tried till, if possible, a breaking point could be discovered. It is actually and truly upon record in the Black Books of Lincoln's Inn that in 1559 their lordships issued an order that no Fellow of the House should wear a beard of above a fortnight's growth. Who, one wonders, was to assess the length to which the beards of men of different constitutions might attain in a fortnight's freedom from the razor? Or was every Fellow of the Inn to go about with a certificate from a barber in his pocket that he had been duly shaved within the last fortnight, ready for production to any Judge or Bencher who might be officious enough to ask for it? But even this order did not make Grizel rebel—at least not for a little while. She submissively accepted it, and on November 2, 1559, the Benchers affixed a fine for the breach of this order, and then their difficulties began; difficulties, probably, of the kind hinted at above. Before the second statutory shaving

[1] *The King* v. *Benchers of Gray's Inn.* Douglas's Reports, i. 354.

day after the promulgation of their notice affixing a penalty, Grizel did turn, and on November 27 the Benchers decreed that 'all orders heretofore made in this House touching beards shall be void and repealed.' And the Judges, having at last discovered a point of interference which they could not maintain, discreetly held their peace. But that such an order could have been accepted even for a moment surely proves that obedience to the Judges was a part of some generally recognized agreement which brought with it its own compensation and reward.

By what process of selection and with what forms apprentices were admitted to the Bar immediately after the Statute of Edward I, and before the times of which written chronicles survive, we know nothing. There is no record extant of what John de Mettingham and his colleagues did upon the receipt of Edward I's order. There never appears to have been (till 1868) a roll on which barristers were officially recorded barristers *qua* barristers. But one need hardly be surprised at this when the same thing has to be said of the Serjeants. They, too, never appear to have been officially recorded.

The conclusion, then, at which I arrive is this: that authority to call to the Bar was granted by Edward I, with statutory confirmation, to the Judges exclusively, and that the Judges have constituted the Benchers of the Inns of Court their deputies for this purpose. The Benchers call to the Bars of their respective Inns, and the Judges receive at the Bar of the Court without further form or ceremony those whom the Benchers, as their authorized deputies, have called. And this reception by the Judges, without verbal expression, and consisting of nothing more than a tacit permission to a barrister called to the Bar of his Inn by the Benchers of his Inn to appear at the Bar of the Courts unchallenged, seems to have consequences of some technical importance. By long custom we describe ourselves, and are officially and authoritatively described, as barristers-at-law. Now at our call the Benchers of our Inns do not constitute us, nor do they profess to constitute us, barristers-at-law. We are called, as has been noted, only to the Bar of our own Inn—exactly what that may be I must not here stop to consider. How and when, then, do we become barristers-at-law? I take it that it is when we are received by the Judges; and that it is reception by them, in accordance with some long lost or, may be, never formally recorded agreement between them and the Benchers of the Inns of Court, that clothes us with the fuller status. There seems no other time when, and no other means by which, it can be acquired. If this be so, the question arises whether a barrister who has never taken his seat in Court, and has, consequently, never

been received by the Judges, is entitled to describe himself or to be described as anything more than a barrister of his own Inn of Court. It may be fairly assumed, however, that since 1868, when the Barristers' Roll was constituted by the Judges, the signing of that roll is accepted by them as a form of reception. And as the older general Swearing Roll, though not strictly homogeneous with the newer one[1], in that it was the creation of Parliament, and not of the Judges, was signed by barristers *qua* barristers, and was so signed by them within the Courts, we may suppose that the signing of this roll from the first year of William and Mary to the passing of the Promissory Oaths Act in 1868 was also accepted as a form of reception.

In further confirmation of the view that a 'call' by an Inn of Court does not constitute a barrister-at-law it may be mentioned that Waterhouse's lengthy definition of an Utter Barrister[2] makes no reference to the right of audience, the one all important note and privilege of a barrister-at-law. Waterhouse is defining only the barrister as his own Inn of Court creates him. For the complete fulfilment of his *status*, for the enlargement of the Barrister of an Inn of Court into a Barrister-at-law, he must go to those to whom alone the Sovereign gave the necessary authority—the Judges.

I come now to the second question which I propose to discuss, the complete supersession of the appellation 'apprentice' by the appellation 'barrister.' It has been stated in the foregoing pages that there is practically no doubt that the Inns of Court, or the organizations which were the immediate predecessors and parents of the present Inns of Court, were founded by the apprentices after 1292 as a means of qualifying themselves for the new privileges which had been granted to them. The apprentices admitted to the right of audience under the order to John de Metyngham appear to have been distinguished from their 'uncalled' brethren by the appellations of 'apprentices of the court' and 'apprentices of the law.' That these two appellations described the same set of men, and not, as might possibly suggest itself, called and uncalled apprentices respectively, appears clear from the facts that we find 'Apprentices of the Law' coupled with Serjeants in an assessment of Richard II[3]; and that there still survives an order by 'the honourable and puissant prince, the Duke of Bedford, the King's lieutenant,' 'by the assent of the lords spiritual and temporal assembled in this present parliament,' calling upon certain dilatory apprentices of the law to lose no further time, under heavy penalties,

[1] See *The Barristers' Roll*, Law Quarterly Review, xxiii. p. 438.
[2] Fortescutus Illustratus, p. 544. [3] 2 Rich. II (1379), 3 Rot. Parl. 58.

in obeying the King's commands to take upon themselves the 'estate of Serjeant[1].' The still extant references to apprentices, *eo nomine*, are very few, even at a time when we are sure that the appellation was in daily use, and so no argument for its disappearance at any particular date can be founded upon the failure to find instances of its use.

But with the foundation of the new quasi-corporate institutions, involving new methods of legal training, a new nomenclature more in accordance with the new condition of things seems to have been invented. If the apprentices were so named because they were apprentices to definite personal masters, *sc.* the Serjeants, such an appellation would become meaningless when they looked for their teaching and training not to an individual personal master but to the Society of which they were members. We do not know exactly when Lincoln's Inn, the most ancient of the Inns of Court, was founded, but its still extant Black Books go back as far as 1422; and it is clear that there must have been earlier ones even than these. We may fairly date the foundation of the Inn many years before 1420[2]. Now, not in the very earliest extant records of Lincoln's Inn is there any mention of apprentices. Amongst the apprentices themselves, as soon as they had founded these societies for their teaching and training, and by so doing ceased to look for them to any individual personal master, the appellation apprentice seems to have become obsolete, the thing expressed by it having ceased to exist. The appellation they invented in its stead to describe themselves was 'barrister,' apparently derived from the *barrae* or forms on which they sat during their classes for instruction and moots. The first use of the word barrister which I have been able to trace occurs exactly where, if this theory be correct, we should expect to find it, in the Black Books of Lincoln's Inn. The date is Trinity Term, 1454–5[3]. And, as previously, that is to say from 1292, the appellation apprentice had included both 'called' and 'uncalled' apprentices, so now and for a long time subsequently, the appellation barrister included both those upon whom had been conferred the right of audience, and those who were still preparing and qualifying themselves for it. The former were called Utter Barristers, the latter Inner Barristers. They were so called, says Waterhouse, from the positions which they respectively occupied on the forms or *barrae* in the halls of their Inns[4].

[1] 5 Henry V (1417), 4 Rot. Parl. 107 b.

[2] 'It appears, therefore, safe to infer that the Society was founded many years previous to 1420.' Preface to the printed transcript of Lincoln's Inn Admissions, p. vii.

[3] 'Herbert and Sulyard . . . are two of the best barristers of the Inn.' Printed transcript of the Black Books of Lincoln's Inn, vol. i, p. 26.

[4] Fortescutus Illustratus, p. 544.

As the years roll on the appellation Utter Barrister is probably felt to be a little ponderous, but, as the uncalled members of the Inns are Inner Barristers, the qualifying adjective cannot be dropped without causing some confusion; and at last the use springs up of referring to the uncalled Inner Barristers as students, and then the qualifying and distinguishing 'Utter' is dropped, and we have barristers and students simply. The disappearance of the appellation Inner Barrister seems to date from about 1590. In the Black Books of Lincoln's Inn under the date of June 23, 1590, we have 'all utter barristers and gentlemen under the bar.' We get a step further on July 10, 1606, in 'some suffycient studyentes now under y^e^ Barr'; and, finally, on November 17, 1629, we attain the nomenclature of to-day in 'The petition of the Barristers and the Students of this Society touching the Library.'

But outside the Inns of Court the appellation Barrister did not at once come into general use. The old appellation of Apprentice seems to have died out before the new one actually—outside the Inns of Court—supplanted it. In the Year Books of Henry VI we find several instances of counsel, who do not appear to have been Serjeants, and who would, in the circumstances, have been described as apprentices of the Court a few years earlier, and as barristers a few years later, being described simply as men 'learned in the law[1].'

It is true that readers of Waterhouse and Dugdale will find in the books of those authors a good deal about apprentices at a much later date than Henry VI. Waterhouse, indeed, gives an elaborate definition of an apprentice as late as 1663[2]. But there is absolutely nothing in any of the records of the Inns of Court to give any support or authority to this definition; and if there is any historic truth in it or real foundation for it, it would seem to be merely as the definition of the conditions which barristers had to fulfil before they were colloquially known amongst their fellows at that time as apprentices. And Dugdale tells us that the word had changed its meaning in his time; it used, he says, to mean a student—he does not say when and for how long; now it means a Double Reader[3]. The appellation had, in fact, ceased to be an official or technical one, and had become a merely popular one, meaning one thing at one time and another at another.

That I may not omit anything of which I am aware that bears on the subject, I must mention that Plowden on the title-page of

[1] 'Homes erudite en le ley,' M. 21 Hen. VI, fo. 15, pl. 30. 'Home appris en ley,' H. 34 Hen. VI, fo. 25, pl. 3. 'Home appris de le ley de terre,' M. 39 Hen. VI, fo. 21, pl. 31.

[2] Fortescutus Illustratus, p. 138.

[3] Origines Juridiciales, p. 143.

his 'Reports' calls himself in 1578 'un Apprentice de le comen ley,' and that Sir Henry Finch in 1613 on the title-page of his 'Nomotechnica' describes himself as 'Apprentice del ley'; and other similar instances could probably be adduced. Even as late as 1839 Lord Campbell (then Attorney-General) spoke of himself as 'an apprentice of the law[1].' Of all these I think we may fairly and reasonably say that they were unadvised uses of the appellation, merely a kind of sentimental re-echoing of a long past away name, dear to the recollection. But all this is really by the way, for no one would contend that the appellation of apprentice, for counsel under the degree of Serjeant, had not been superseded by that of barrister even in Plowden's time; and this supersession of the former appellation by the latter seems naturally and reasonably assignable to the facts that apprentices in any real sense of the word ceased to exist after the foundation of the Inns of Court; that the Inns of Court invented the new appellation of barrister to describe the class of men who had been formerly called apprentices; and that the scope of this appellation became gradually narrowed, as we have seen, till it included only those upon whom, through the mediation of the Inns of Court, the right of audience was conferred.

An undergraduate of tradition was called upon in one of his examinations to prove Euclid I. 5. Subsequently asked by his tutor if he had succeeded in doing so, he replied, 'Well, "prove" is a strong word, but I made it highly probable.' I will not say more than the undergraduate.

Since writing the foregoing paper I have happened upon an old will preserved at Somerset House, dated St. Bartholomew's Day, 24 August, 1404[2]. It was executed by John Bownt of Bristol, and is written in Latin. It contains the following bequest amongst others. 'Item lego Johanni Beoff apprenticio curiæ et socio meo dilecto xl solidos . . . nova statuta mea . . .' The testator's profession is not stated, but his possession of the statutes, some other details in the will, and especially his mention of an apprentice of the Court as his 'socius,' make it seem probable that he was an apprentice of the Court himself. This suggests the possibility of a partnership between apprentices of the Court.

Again, the testator mentions the names of two apprentices (not apprentices of the Court) as his own apprentices, bound for a term of years; and one of these two at least was in some sort of relationship also with his 'socius' John Beoff. This suggests another question. Did apprentices of the Court have 'uncalled' apprentices

[1] *The Serjeants'* case, p. 116.

[2] Register-Book, *Marche*, 8.

bound to them? I have no space here for the discussion of these questions, which can only be stated now.

This old will is interesting from another point of view. The earliest date hitherto known for the separate existence of the two Societies of the Temple is 1440[1]. This will of 1404 contains a bequest to 'Roberto mancipio medii Templi.'

W. C. BOLLAND.

[1] 'A Calendar of the Inner Temple Records' (1896). 'A Calendar of the Middle Temple Records' (1903).

THE INCONSISTENCIES OF THE DOCTRINE OF EQUITABLE CONVERSION.

OF all the principles of equity, the doctrine of conversion seems to present the most difficulty to students; and this is not surprising when it is realized how utterly impossible it is to reconcile the decisions with any consistent theory of the subject.

What is surprising is that the textbooks give hardly any indication of the inconsistency which is the real source of the difficulty. With one accord, having stated the doctrine, they proceed to expound the decisions as if they all flowed quite simply and naturally from one general principle, so that no difficulty ought to be experienced in grasping the rules the courts have laid down.

The inconsistency of the cases becomes apparent, however, if the reasons which have been given for the decisions in them are carefully investigated[1].

The doctrine is stated in the oft-quoted passage from the judgment of Sir Thomas Sewell M.R., in the case of *Fletcher* v. *Ashburner*[2], as follows:

'Money directed to be employed in the purchase of land and land directed to be sold and turned into money are to be considered as that species of property into which they are directed to be converted; and this in whatever manner the direction is given, whether by will, by way of contract, marriage articles, settlement or otherwise; and whether the money is actually deposited or only covenanted to be paid, whether the land is actually conveyed or only agreed to be conveyed, the owner of the fund or the contracting parties may make land money or money land.'

But perhaps the statement of Lord Justice Bowen in the case of *Attorney-General* v. *Hubbuck*[3] is even better:

'It is an established principle in equity that when money is directed or agreed to be turned into land, or land agreed or directed to be turned into money, equity will treat that which is agreed to be, or which ought to be, done as done already, and impresses upon the property that species of character for the purpose of devolution and title into which it is bound ultimately to be converted.'

[1] See the masterly series of articles by the late Professor Langdell in the Harvard Law Review, vol. xviii. pp. 1, 83, and 245, and vol. xix. pp. 1, 79, 233, and 321, to which the writer is largely indebted.

[2] (1779) 1 Bro. Ch. 497; Wh. & Tud. L. C. Eq., 7th ed., vol. i. 327.

[3] (1884) 13 Q. B. D. at p. 289.

It is commonly said that the doctrine proceeds upon the principle or maxim that equity regards that as done which has been agreed or which ought to be done, and there are two principal classes of transactions which cause the doctrine to be applied:

(*a*) A contract for sale or purchase of land.

(*b*) A trust for sale or purchase of land.

It is desirable to deal with these separately.

(*a*) *Contract for sale or purchase.*

If A contracts to sell Blackacre to B in fee and dies before executing the conveyance, in equity the property is converted as from the date of the contract; that is to say, although the legal estate in Blackacre devolves (subject to Part I of the Land Transfer Act, 1897) on A's heir or devisee, as the case may be, the right to receive the purchase-money will devolve through A's personal representatives on his next of kin or residuary legatee [1].

The reason for this is that A's personal representatives have the right in equity to enforce specific performance of the contract, i. e. to compel B to pay his purchase-money, which they must exercise if required, on behalf of those entitled to the deceased's personal estate, to whom, of course, on the contract being performed, the money belongs.

That this is so is shown clearly by the authorities. Vice-Chancellor Kindersley put the matter in the plainest way in 1861:

'The only reason why a contract by the owner of land for the sale of it to another operates to effect a conversion, is that a court of equity will compel him specifically to perform his contract. A court of equity considers that as done which ought to be done, and which it will compel to be done. . . . Conversion as arising from a contract to sell is merely and exclusively the consequence of the application by a court of equity of the doctrine of specific performance. Where there can be no specific performance there can be no conversion [2].'

Mr. (afterwards Lord) Justice Fry gave a similar explanation a little later:

'The conversion of property, which means the treating it as belonging to somebody else before it has been actually transferred to that other person, results from a contract which can be specifically enforced; so that where there is no specific performance of contract possible, there is no conversion. It flows in effect from the principle of equity which considers that done which ought to be done, and which the court can compel to be done, and it extends so

[1] See per Kindersley V.-C. in *Haynes* v. *Haynes* (1861) 1 Dr. & Sm. at p. 432.

[2] *Haynes* v. *Haynes* (1861) 1 Dr. & Sm. at p. 451.

far back as these circumstances exist and no farther. In other words, when there is a contract capable of being specifically enforced as from the date of that contract and neither earlier nor later, the property comprised in the contract is deemed to belong to the purchaser and the money to be paid is to be deemed to belong to the vendor, because those two things ought to be done [1].'

Similarly, if A contracts to sell Blackacre to B in fee, and B dies before conveyance, B's heir, if he died intestate, is entitled to call on B's personal representative to pay the purchase-money to A, and obtain a conveyance of the property to him, the heir. But again, in order for him to be able to do so, he must show that there was a binding contract at the death of the ancestor, and one which could be specifically enforced.

'Two things must exist at the death of the testator; first a valid contract, and secondly one which could be enforced against an unwilling purchaser,'

to quote Sir J. (afterwards Lord) Romilly [2], or in the words of Sir William Grant:

'The inquiry must be whether at his death a contract existed by which he was bound and which he could be compelled to perform [3].'

If, therefore, for any reason specific performance could not be obtained against the purchaser, his heir would have no equity, and the doctrine would not apply. Lord Eldon himself may be vouched for this:

'If at his death he could not be compelled to take, clearly the heir could not say to the executor, "I will have the estate; and you shall pay for it" [4].'

It may be said that the question should be not whether the contract could be enforced *against* the deceased, but *by* the deceased, since the equitable conversion depends on the devolution of the *right* to have money laid out in land, or vice versa, and there are cases in which the contract might be enforced by the deceased, though not against him. But this not so because it is said, although the deceased himself, if alive, might elect to take the estate, yet when he is dead the Court cannot speculate upon what he would or would not have done; so that the inquiry must be whether

[1] *Edwards* v. *West* (1878) 7 Ch. D. at p. 862; see also per Jessel M. R. in *Lysaght* v. *Edwards* (1876) 2 Ch. D. at p. 506; and per Kay J. in *Thomas* v. *Howell* (1886) 34 Ch. D. at p. 169, and the argument of Lord Eldon when Mr. Scott in *Lawes* v. *Bennett* (1785) 1 Cox at p. 170.

[2] *Garnett* v. *Acton* (1860) 28 Beav. at p. 337.

[3] *Buckmaster* v. *Harrop* (1802) 7 Ves. at p. 343.

[4] *Broome* v. *Monck* (1805) 10 Ves. at p. 606.

at his death a contract existed which he could be compelled to perform [1].

So far, then, all is plain enough, and numerous cases are to found in which this theory of the matter has been given effect to [2].

But difficulty arises when the effect of an option to purchase land has to be dealt with. Suppose A leases Blackacre to B, giving B an option to purchase the fee simple. A then makes his will, devising all his real estate to C, and making D his residuary legatee. A dies, and after his death B exercises the option. D is entitled to the purchase-money, not C. This was the decision in the well-known case *Lawes* v. *Bennett* [3]. So if A were to die intestate it would be his next of kin who would be entitled, not his heir [4].

Now in these cases there is nothing that 'ought to be done' until the exercise of the option. Till then no one has any right to specific performance, there is no equity to have a conversion made. The decisions, therefore, are quite inconsistent with the principle above stated. The ground on which Sir Lloyd Kenyon M.R., who decided *Lawes* v. *Bennett*, proceeded is very obscure. He says:

'It is very clear that if a man seised of real estate contract to sell it, and die before the contract is carried into execution, it is personal property of him. Then the only possible difficulty in this case is that it is left to the election of Douglas [the lessee] whether it shall be real or personal . . . When the party who has the power of making the selection has elected the whole is to be referred back to the original agreement, and the only difference is that the real estate is converted into personal at a future period.'

The last sentence of this passage seems to be contradictory on the face of it; if it means anything it must be that the equitable conversion takes place at the giving of the option, though the actual conversion is made later. Just as it would if A at the date of the lease had made an offer to sell the property to B, which on B's acceptance constituted a contract to sell, binding A as from the date of the offer. But the objection to this way of stating the matter is that an option is not an offer—it cannot be withdrawn—it creates an obligation, and no acceptance of it need be communicated. It is, in fact, a unilateral contract. Even if the person to whom the option is given were to go so far as to promise to buy, the result is not a bilateral contract but two unilateral contracts; the two promises would not be the consideration for each other,

[1] See Sugden, Vendors and Purchasers, 10th ed., 306; the passage is somewhat modified in the 14th ed., 193.

[2] See for example *Darby* v. *Darby* (1856) 3 Drew. 495; *Haynes* v. *Haynes* (1861) 1 Dr. & Sm. 426; *Steward* v. *Blakeway* (1869) L. R. 4 Ch. 603; *Edwards* v. *West* (1878) 7 Ch. D. 858; *Thomas* v. *Howell* (1886) 34 Ch. D. 166.

[3] (1785) 1 Cox, 167.

[4] *In re Isaacs* [1894] 3 Ch. 506.

and each would have to be supported by some other consideration. Therefore, though an option is a contract, it is one which from the nature of things cannot be specifically enforced until the option is exercised [1]. Under it the giver of the option, A, had no right to the purchase-money during his life, consequently the right cannot descend through his personal representatives to his next of kin or residuary legatee [2].

The decisions in this class of cases have often been adversely commented on [3], but are now settled law. Being, however, inconsistent with the principle of conversion, they have not unnaturally been made the subject of qualifications which involve the student in the necessity of learning a series of arbitrary rules [4].

Nor have the courts been even consistent in their inconsistency, for they have decided that in such cases as these, even though on the exercise of the option it is the residuary legatee or next of kin, as the case may be, who is entitled to the purchase-money, the intermediate rents and profits of the land belong to the devisee or heir. This was decided in the case of *Townley* v. *Bedwell* [5] by Lord Eldon, who only professed to be following the decision of Lord Kenyon in *Lawes* v. *Bennett*. That case had not then been reported, and Lord Eldon, who had been one of the counsel engaged in it, cited it from his own manuscript note. It was afterwards reported in vol. i of Cox's reports, first published in 1816. As reported, it does not appear that the question of the right to the intermediate rents was considered in it at all. In fact Cox says, 'the *single* question was . . . whether . . . the purchase-money should be considered as part of the real or personal estate of the testator.' It looks, therefore, rather as if Lord Eldon decided *Townley* v. *Bedwell* under a misconception. However, he may have remembered *Lawes* v. *Bennett* better than Cox ever understood it. Certainly any other decision would have been very hard on the devisee or heir-at-law, and, inconsistent as it seems to say that the equitable conversion relates back to the giving of the option for the purpose of determining the right to the purchase-money, but does not relate back

[1] See per Lord Eldon in *Ripley* v. *Waterworth* (1802) 7 Ves. at pp. 436, 437; and per Fry J. in *Edwards* v. *West* (1878) 7 Ch. D. at p. 862.

[2] See Harvard Law Review, vol. xviii. 10–14. The distinction between the two kinds of contract is pointed out, though somewhat obscurely, in the arguments of the unsuccessful side in *Lawes* v. *Bennett*, and in the judgment of Knight Bruce V.-C. in *Emuss* v. *Smith* (1848) 2 D. G. & Sm. at p. 735.

[3] By Lord Eldon in *Townley* v. *Bedwell* (1808) 14 Ves. at p. 596; by Knight Bruce V.-C. in *Emuss* v. *Smith*, *supra*, at p. 734; by Kindersley V.-C. in *Collingwood* v. *Row* (1857) 3 Jur. N. S. at p. 786; by Fry J. in *Edwards* v. *West* (1878) 7 Ch. D. at p. 863.

[4] See *Drant* v. *Vause* (1842) 1 Y. & Coll. 580; *Emuss* v. *Smith* (1848) 2 D. G. & Sm. 722; and *In re Pyle*, *Pyle* v. *Pyle* [1895] 1 Ch. 724; and compare *Weeding* v. *Weeding* (1861) 1 J. & H. 424.

[5] (1808) 14 Ves. 591.

for the purpose of determining the right to the intermediate rents, it also is now settled law.

The case of a unilateral covenant to buy and settle land is treated on the same footing as an ordinary contract of sale. It causes an equitable conversion if specific performance of it can be obtained against the covenantor, but not otherwise[1]. 'To keep on foot the notional conversion of money into land,' it is said in Lewin on Trusts[2], 'it is evident there must be a right in some one to insist on the actual conversion.'

(*b*) *Trust for sale or purchase.*

When we turn to trusts for the sale or purchase of property we find still another inconsistency. It would be natural to suppose that the reason why a trust to convert causes an equitable conversion is the same as in the case of a contract—that equity will compel its performance, so as to confer a right to have an actual conversion made. And so Prof. Langdell boldly says:

'Why does the creation of such a trust or duty cause an equitable conversion? For the same reason that a contract causes an equitable conversion, namely, that equity will enforce specific performance of such a trust or duty[3].'

But the decisions in the cases are not put on this ground at all. On the contrary, they all, or nearly all, seem to make the equitable conversion depend on the intention of the testator to convert the property. Two leading authorities for this may be cited. The first is the celebrated argument of Lord Eldon when Mr. John Scott in the case of *Ackroyd* v. *Smithson*[4], where the question was, a testator having given his residuary real and personal estate to trustees upon trust to sell and divide the proceeds between certain legatees, and two of the legatees having died in the testator's lifetime, whether their lapsed shares went to the surviving legatees, the next of kin, or the heir-at-law. Lord Eldon, whose triumphant career is dated from his successful argument on behalf of the heir-at-law[5], says:

'That the heir-at-law is entitled to every interest in land not

[1] See *Walrond* v. *Rosslyn* (1879) 11 Ch. D. 640. It may be questioned, however, whether the decision in this and the like cases is consistent with the principle. See Harvard Law Review, vol. xviii. 256 et seq.

[2] 11th ed., 1193.

[3] Harvard Law Review, vol. xviii. 266. The dictum of Kindersley V.-C. in *Darby* v. *Darby* (1856) 3 Drew. at p. 505, comes very near this. 'What is the doctrine of this Court as to conversion? If a testator seised of real estate devises it for sale and directs that the proceeds of the sale shall be divided among certain persons, *so that each of the cestuis que trustent is entitled to say he will have it sold* and will take his share of the proceeds, that real estate is in equity converted into personalty.'

[4] (1780) 1 Bro. Ch. 503.

[5] See Twiss, Life of Lord Eldon, 2nd ed., 116 et seq.

disposed of by his ancestor is so much of a truism that it calls for no reasoning to support it. It is not necessary for the heir-at-law to deny that the intention of the testator has designed him nothing: his intention has certainly been equally unpropitious to his next of kin; but it is not enough that the testator did not intend that his heir should take: he must make a disposition in favour of another. . . . We admit that a person may decide what shall be the nature of his property after his death, so as to preclude all questions between real and personal representatives. But we insist that if he has not actually so decided, they upon whom the law casts the title to personal estate can no more claim in a court of equity money arising from the sale of land than the heir can claim property admitted to be of a personal nature. As to the question of fact whether he meant that in some event only, or that in all events, the produce of his real estate should be considered as personalty, we admit that in favour of his residuary legatees he meant to convert the whole into personalty, in case all his residuary legatees should eventually take the whole; but we contend that he has intimated no intention as to that part of the produce as to which his disposition in the event which has happened has failed of effect. He converts it out and out, indeed, if you speak of his intention as to the qualities of the property, which his legatees were to take; but as to such part of the property as in the event they have not taken he has not determined upon its nature; he never meant to determine upon its nature as between his heir-at-law and his personal representative or next of kin, because he appears not to have adverted to the possibility of any events taking place which would give the one or the other an interest in his property, and he designed no part of his property for either. In the event, the one or other must take some part of it; but to say he has made it all personal property, and that therefore the law must give it to the next of kin, is to apply an argument deduced from what was the testator's intention in case events had taken place which had not for the sake of proving a similar intention if circumstances happened, directly contrary to those with relation to which only the testator formed his intention. To argue from what the testator intended with respect to residuary legatees by way of proving that he intended the same in favour of his next of kin is to reason from a case in which intention is expressed to prove a like intention in a case which supposes the absence of intention . . .'

The second authority is the judgment of Sir John Leach in the case of *Smith* v. *Claxton* [1], where he says:

'Under every will, when the question is whether the devisee or the heir failing, the devisee takes an interest in land as land or money, the true inquiry is whether the devisor has expressed a purpose that in the events which have happened the land shall be converted into money? [2]'

[1] (1819) 4 Madd. 484.

[2] See also the judgments of the same judge in *Phillips* v. *Phillips* (1832) 1 My. & K.

But here also the courts have not been consistent, for there are cases which decide that however clearly the testator has expressed an intention to make real property devolve as personal or vice versa, no mere direction to that effect will have the desired result, nothing but an absolute trust for sale will effect an equitable conversion. For instance, in *Hyett* v. *Mekin* [1] the will contained the words, 'I declare that my residuary real estate so bequeathed in trust [? as] aforesaid shall for the purposes of transmission be impressed with the quality of personal estate from the time of my decease,' and yet it was held that the will did not effect a conversion. 'Nothing short of an absolute and effective trust for sale can in equity create a conversion of realty into personalty,' it has been said [2]. Why not? The reason must be that unless there is a trust and a *cestui que trust* to enforce it, there is no right in any one to have an actual conversion made.

The result of putting the equitable conversion in cases of trust on the ground of the intention of the testator or settlor instead of the right to enforce performance of the trust is that the courts have become involved in a string of difficulties when they have had to determine who is entitled to property directed to be converted if the trust wholly or partially fails [3].

For example, in the case of *In re Richerson Scales* v. *Heyhoe* [3], the testator had devised his real estate upon trust to sell and had given the proceeds of sale, subject to certain life interests, to a class of persons none of whom was in the circumstances able to take the property, with the result that the trust failed except as to the life interests. Some of the real estate had been sold, but some remained unsold when the period of distribution arrived, and in the meantime the heir-at-law of the testator had died. It was held that both the proceeds of the land sold and the land unsold went to the next of kin of the heir-at-law [4]. But as between the next of kin and the heir-at-law of the testator's heir-at-law the former had no right to enforce a trust for sale at all.

If the case had been determined in accordance with the principle

649, and *Jessopp* v. *Watson* (1833) 1 My. & K. 665; per Wigram V.-C. in *Fitch* v. *Weber* (1848) 1 Hare 145, and in *Griffith* v. *Ricketts* (1849) 7 Hare 299; and per Jessel M.R. in *Court* v. *Buckland* (1876) 1 Ch. D. at p. 610.

[1] (1884) 25 Ch. D. 735. See also Jarman, Wills, 5th ed., 588, 589.

[2] By Stirling J. in *Goodier* v. *Edmunds* [1893] 3 Ch. at p. 462.

[3] See as to total failure *Smith* v. *Claxton* (1819) 4 Madd. 484; *Clarke* v. *Franklin* (1858) 4 K. & J. 257, at p. 265; and as to partial failure in wills *Ackroyd* v. *Smithson*, *supra*, *Smith* v. *Claxton*, *supra*; *In re Richerson* [1892] 1 Ch. 379; *Cogan* v. *Stephens* (1835) 1 Beav. 482 n., 5 L. J. Ch. 17; and *Curteis* v. *Wormald* (1878) 10 Ch. D. 172; and in deeds *Clarke* v. *Franklin*, *supra*, and see Prof. Langdell's criticisms of these cases, Harvard Law Review, vol. xix. 26 et seq.

[4] Chitty J. considered that the case was covered by authority which he was bound to follow, namely *Jessopp* v. *Watson* (1833) 1 My. & K. 665, and *Attorney-General* v. *Lomas* (1873) L. R. 9 Ex. 29.

that there can be no equitable conversion unless there is a right in some person to enforce an actual conversion, the decision must have been quite different. It would have been that at the testator's death the land descended to his heir-at-law (his sister) subject to the life interests and to the right of the respective tenants for life to have the land sold. As to so much of the land as was actually sold between the testator's death and the death of his heir-at-law, the latter's title to the land was divested by the sale, she acquiring a title to the purchase-money instead, and on her death so much of the land as remained unsold descended to her heir, and the produce of what had been sold devolved on her next of kin; as to so much of the land as was sold between the death of the testator's heir-at-law and that of the last of the tenants for life, the title of her heir-at-law was divested, and he acquired a title to the purchase-money instead[1].

From what has been said it is apparent that the decisions in the cases cannot be reconciled with any consistent principle, and the result is that the student is faced with the necessity of committing to memory a long series of complicated rules which are merely arbitrary.

It is said that Oliver Cromwell once called our land laws an ungodly jumble. It would have been excusable if he had used even stronger language about the doctrine of conversion.

WALTER G. HART.

[1] See Harvard Law Review, vol. xix. p. 28.

SOME ASPECTS OF THE LAW OF FOREIGN JUDGMENTS, WITH SPECIAL REFERENCE TO DEFAULT JUDGMENTS OF ENGLISH AND COLONIAL COURTS *INTER SE.*

IT is proposed in this essay to first state some principles that, while familiar enough to students of international law, may be conveniently referred to by way of introduction to the subject here discussed, and then to pass to a more particular consideration of the 'effectiveness' of default judgments of Colonial courts in England and of English courts in the Colonies.

It must be remembered that it is only in cases of default judgments that the question of 'effectiveness' in its international sense can arise[1], and 'default judgment,' as used in this essay, means a judgment entered in default of appearance by a defendant, *in a personal action*, founded on service beyond the jurisdiction of the court in which the judgment is entered. The division into heads and sub-heads adopted is for convenience only, and does not profess to be entirely scientific, and no doubt the topics discussed will be found to overlap to some extent.

I A. *The Conflict between Municipal and International Law.*

To a clear understanding of the intricacies of the law of foreign judgments, it is essential to have an accurate conception of the difference in principle as the several questions are regarded from the view-point of municipal law on the one hand, and of private international law on the other[2].

In the ultimate analysis, of course, what is or what is not the proper rule or principle of private international law to be applied to the particular case under consideration must be determined by the court in accordance with the principles or rules to be found in the law of its own country.

'These rules make up that department of English law which deals with the conflict of laws, and may be provisionally described as principles of the law of England governing the extra-territorial operation of law or recognition of rights. This branch of English law is as much part of the law of England as the Statute of Frauds or the Statute of Distributions[3].'

[1] See *Voinet* v. *Barrett*, 55 L. J. Q. B. 39.
[2] See *Pemberton* v. *Hughes* [1899] 1 Ch. p. 791.
[3] Dicey on Conflict of Laws, 2nd ed., Introduction, p. 3.

Thus the law of England (as of any other country) may be divided into two branches:

(*a*) 'Territorial' or 'Local' law.

(*b*) 'That part of the law (of England) which provides directions for the judges when called upon to adjudicate upon any question in which the rights of foreigners, or the effect of acts done, or to be done, in a foreign country, or with reference to a foreign law, require determination[1].'

A mastery of this twofold division of the law of England (or for that matter of any civilized country) puts a student on his guard against an ambiguity of language which, unless clearly conceived, introduces confusion into every discussion concerning the conflict of laws[2].

The laws of most countries provide for some method of service of process beyond the jurisdiction of their respective courts.

The individual States of the United States do not, as 'Countries'[3], claim the right of service of process beyond the territorial limits of the State. Indeed the Supreme Court of the United States has held that the State cannot legalize service of process in a personal action on non-residents of the State.

'Where the defendant is a non-resident, a personal judgment by default cannot be rendered against him merely upon service by publication. Such a judgment is authorized only on the personal service of process *within* the State or on the defendant's voluntary appearance[4].'

This is a rule of *Municipal Law*. Under the American rule a default judgment in a purely personal action founded on service *ex juris* is not valid even in the State whose courts have rendered the judgment[5]; but it does not by any means follow, as a necessary

[1] Dicey on Conflict of Laws, 2nd ed., Introduction, p. 5.

[2] Ibid.: cf. Westlake on Private International Law (1890), p. 7; Savigny's Conflict of Laws (Trans. of Wm. Guthrie), Edin., 1880, pp. 68-9, Note B, p. 75.

[3] 'Country' is the whole of a territory, subject under one sovereign to one system of law, and generally the definitions given by Prof. Dicey (Dicey on Conflict of Laws (1908), pp. 67, 68) of 'Country,' 'State,' 'Foreign,' 'Foreign Country,' 'England,' 'United Kingdom,' 'British Dominions,' &c., &c., are adopted for the purposes of this article, except where the context shows them inapplicable.

[4] Encl. of Pleadings and Practice, vol. vi, p. 34; *Pennoyer* v. *Neff*, 95 U. S. 714; *Anderson* v. *Goff*, 72 Cal. 69.

[5] This difficulty is partially got over in the States by the method of 'Attachment' of the assets of the non-resident defendant, which the courts hold is a proceeding *in rem*. The rule in question applies to purely personal actions only. It must not be supposed from this that there is no method of proceeding in the United States when the parties in an action reside in different States. In these cases the Federal Courts have jurisdiction; and even when an action is instituted in the State Court under these conditions it can be 'removed' (on the application of either party, I think) into the Circuit Court of the United States for the appropriate Federal district.

consequence, that such a judgment, if sued on in England or France, would be held invalid on principles of private international law. Assuming that the person served *ex juris*, although a non-resident, was a citizen of, and therefore owed allegiance to, the 'country' (i.e. the particular State, e.g. New York) in which the default judgment was obtained, in an action on the judgment in England it might be held, on principles of private international law, as interpreted by the courts in England, that the case came within the rule that

'In an action *in personam* the courts of a foreign country have jurisdiction where the defendant is at the time of the judgment in the action a subject of the sovereign of such country [1].'

'It is clearly not sufficient, in order to impeach a foreign judgment, to show that the court which pronounced it had no jurisdiction by its own rules, if it had jurisdiction according to the principles of international law over the person of the defendant, and the subject-matter of the action [2].'

'Assuming that the decree is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles upon which English courts act in regarding or disregarding foreign judgments is borne in mind. If a judgment is pronounced by a foreign court over persons within its jurisdiction, and in a matter with which it is competent to deal, English courts never investigate the propriety of the proceedings in the foreign court, unless they offend against English views of substantial justice [3].'

Lindley M.R. A, adds in the same case:

'The defendant's contention entirely ignores the distinction between the jurisdiction of tribunals from an international and their jurisdiction from a purely municipal point of view [3].'

This subject was discussed before the Supreme Court of the North-West Territories (Canada) in an interesting case—*Dakota Lumber Co.* v. *Rinderknecht* [4]. The defendant was born in the State of Wisconsin, he removed to South Dakota, where a cause of action accrued against him upon which he was sued. He was personally served with the summons in the South Dakota action in the North-West Territories, where he had been residing for

[1] Dicey on Conflict of Laws, Rule 83, Case 2.

[2] Foote, Private International Jurisprudence, p. 550; *Vanquelin* v. *Bouard*, 33 L. J. C. P. 78-84; see also *Henderson* v. *Henderson*, 6 Q. B. 288, 66 R. R. 384; *Bank of Australasia* v. *Nias*, 16 Q. B. 717, 83 R. R. 698.

[3] *Pemberton* v. *Hughes* [1899] 1 Ch. per Lindley M. R. 781-7; and cf. Dicey on Conflict of Laws, 2nd ed., pp. 395-6.

[4] 2 Western Law Reporter (Canada), p. 275.

some fourteen years. Judgment was entered in the South Dakota Court on default of appearance, and an action was then brought on this default judgment in the Supreme Court of the North-West Territories. The trial judge found that he was still a subject of the United States, and held the South Dakota judgment binding upon him, on the assumption that the case was governed by *Schisby* v. *Westenholz*[1] and *Rousillon* v. *Rousillon*.[2] The Court in banc reversed this judgment on the ground that the defendant, although a citizen of the United States, was not shown to be a 'citizen,' or subject to the sovereignty, of the State of South Dakota, and in this connexion adopted Dicey's definition of 'country'—'the whole of a territory subject under one sovereign to one system of law.' The soundness of the decision seems indisputable on the main point at issue, and in giving the judgment of the Court Scott J. says in reference to *Pennoyer* v. *Neff*[3]:

'This case, in deciding that a State court cannot under any circumstances exercise any authority over any person who is beyond the limits of its territory, or bind him by its judgments, is not in accord with our laws respecting the powers of the courts of the different law districts of the Empire.'

It is a fair inference from the decision that if Rinderknecht, the defendant, had been shown to have been a 'citizen' of the State of South Dakota at the time of the judgment, the Court would have affirmed the judgment of the trial judge, Wetmore J.[4], notwithstanding the fact that the judgment sued upon was invalid in the 'country' in which it was given.

The converse of this question is involved in the consideration of the regard or disregard with which the courts of the different States, that collectively make up the United States, will treat 'default judgments' of those countries (e.g. England) whose laws expressly provide for service *ex juris* of a writ in a personal action. Take the case of an Englishman, a British subject, resident in New York, against whom a 'default judgment' has been entered in the High Court of Justice in England, founded solely upon service under Order XI made upon the defendant in New York. According to the municipal law of England, the judgment is valid; according to the municipal law of New York, a judgment under analogous circumstances is invalid. What are the principles of *international* law which should govern the New York courts? Is this a case in which the New York courts should 'investigate the

[1] L. R. 6 Q. B. 155. [2] 49 L. J. Ch. 338.
[3] 95 U. S. 748, cited *ante*.
[4] See 2 Western Law Reporter (Canada), p. 481.

propriety of the proceedings in the foreign court' on the ground that 'they offend against their views of substantial justice[1]'?

This would seem to be a particular case under the general proposition—that a judgment may be valid by the municipal law of the country where it was pronounced (e. g. so as to be enforceable against assets of the defendant in such country), but invalid when it is attempted to sue on it in a foreign country, on principles of private international law. This is well illustrated by the *apparently* anomalous attitude of English courts (including colonial) in regard to an action on a foreign default judgment against a British subject, which they treat as being without jurisdiction, and therefore not enforceable in England, in spite of the fact that English courts are authorizing service on foreigners by notice of writ, and entering default judgments founded on such service practically every day of the week. The Rajah of Faridkote's case must now be considered the *locus classicus* on this subject. 'No territorial legislation can give jurisdiction which any foreign court ought to recognize against absent foreigners who owe no allegiance or obedience to the power which so legislates[2].'

The validity of the foreign judgments in England (assuming that they were invalid in the countries where pronounced), considered in *Vanquelin* v. *Bouard* and *Pemberton* v. *Hughes*, depended on three considerations:

(1) That the foreign court had jurisdiction of the subject-matter.

(2) That the foreign court had jurisdiction of the person.

(3) That the proceedings did not offend against English views of substantial justice.

Now to apply these tests to our supposed action in New York:—the jurisdiction of the English court over the subject-matter is assumed *ex hypothesi*. Whether the New York court should hold that the English Court, also, had jurisdiction over the person depends on the question whether the proceedings (i. e. by service *ex juris*) do or do not offend against *American* views of substantial justice. If the reason for the holding in *Pennoyer* v. *Neff*—that service of process beyond the territorial limits of the State is a nullity—is founded purely on municipal law, on something peculiar to the constitutions of the several States or to their particular systems of law, it is submitted that logically there is no violence to American views, or what on principles of international law should be American views, of substantial justice, in holding that the English judgment in the postulated case is a valid judgment as the foundation of an action in the State courts, i. e. an 'effective' judgment. On the other hand,

[1] See per Lindley L.J. in *Pemberton* v. *Hughes* cited *ante*.

[2] *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670.

if in *Pennoyer* v. *Neff* (and other authorities) the judicial opinions are founded on the view that service *ex juris* is wrong on principles of international law, then the 'default judgment' in the postulated case clearly would and *should* be against American views of substantial justice, and should *not* be enforced. That is, the American courts would be clearly justified in the international sense in taking this position.

'We refuse to allow any validity to default judgments on service of our process beyond the territorial limits of the state, as such service we hold contrary to the principles of international law, therefore we must also refuse to enforce such judgments of a foreign court founded on service contrary to our view of substantial justice.'

This discussion of the question, *a priori*, may seem somewhat too academic, but it has been purposely introduced to help in the elucidation of some of the questions which will be considered a little further on.

As to how the American courts do regard this question, the decision in *Shepard* v. *Wright* is quoted in the American notes to Dicey on Conflict of Laws[1]. In that case it was held that a personal judgment rendered in Canada against a resident of New York would not, though the defendant was a 'citizen' of Canada, be enforced against him in New York, unless he had been served with process in Canada, or voluntarily appeared in the action.

That this is a correct statement of the law, and moreover that it is founded on general principles of substantial justice and of international law, according to American views, is supported by the judgment of the New York Court of Appeals in *Ward* v. *Boyce*[2], a very interesting case in connexion with the whole subject now under discussion.

To an action on a promissory note held and sued on by a married woman in a county circuit of the State of New York, a judgment of a justice's court of the State of Vermont was pleaded, whereby in a proceeding commenced by 'trustee service' in Vermont against the plaintiff's husband and the defendant (the maker of the note) by a creditor of the husband, and to which the plaintiff was made a party, it was adjudged that the note was not the property of the wife but of her husband, by the law of Vermont, and that the wife should pay the amount to the husband's creditor in satisfaction of his claim or judgment *pro tanto*. At the time of the trial of the Vermont action, the husband and wife resided in the State of New York. The service of summons on Ward (the husband) was

[1] Dicey, Conflict of Laws (1896), p. 383 (these notes are omitted in the second edition); 59 How. Pr. 512.

[2] (1897) 152 N. Y. 191.

effected by serving the defendant Boyce, 'as *trustee* of the said Eugene Ward, said Ward being a non-resident of the State.' The wife does not appear to have been served at all.

O'Brien J., in delivering the opinion of the Court of Appeals, lays down the following general propositions of law:

'The judgment of a court of a sister state, recovered upon trustee process or attachment proceedings, in which the defendant is not personally served with process, and does not appear, is effectual only to bind such property as is found within the jurisdiction. It can form no basis for a personal judgment, and cannot affect the title of property not seized or attached, and not within the jurisdiction of the sovereignty where the proceedings are had. A party cannot be deprived of property without 'due process of law[1],' and that term in its application to judicial proceedings means a course of legal proceedings *according to those rules and principles which have been established by our jurisprudence for the protection and enforcement of our private rights.* If the proceedings involve the determination of the personal liability of the defendant, he must be brought within the jurisdiction by service of process within the state or voluntary appearance[2].'

'The proceedings in Vermont were substantially in accordance with the statutes of that state. It is not enough, however, to show that the judgment was authorized by statute. In order to entitle it to full faith and credit[3] in another jurisdiction, it must appear that the statute contemplated a judicial proceeding in conformity with the principles above stated.'

From the above it will be seen what a very important modification of the rule that 'English courts never investigate the propriety of the proceedings in the foreign court' is contained in the concluding words of the paragraph, per Lindley M.R. (in *Pemberton* v. *Hughes*, *ante*), 'unless they offend against English views of substantial justice,' and how effectually this language can be used in America to support the interpretation placed by American courts on the principles of international law that should govern this somewhat vexed question.

It may be objected[4] that this case, *Ward* v. *Boyce*, is not in point, because the defendants in the Vermont action (Ward and his wife) were not 'citizens' of Vermont, and therefore do not come within Dicey's Rule 80, Case 2. It is submitted, however, that the decision is not based on the ground that the defendants were not 'citizens'

[1] 'Due process of law.' See the Fifth Amendment to the Constitution of the United States.

[2] Citing, *inter alia*, *Pennoyer* v. *Neff*, 95 U. S. 714.

[3] 'Full faith and credit.' See Constitution of United States, Article 4, s. 1.

[4] The nature of this objection, however, becomes of great importance when decisions based on the relations of the several States of the Union to each other and to the 'United States' are quoted as analogies in questions based upon the relations of the several Provinces of Canada to each other and to the Dominion. See *Shepard* v. *Wright*, 59 How. Pr. 512, *ante*.

of Vermont, but on the ground that personal service within the state or voluntary appearance is *in all cases* essential to found jurisdiction in a personal action, by the principles of international law and the jurisprudence of the United States, so as to make the judgment 'effective' when sued upon, or valid when pleaded as *res judicata*, in a foreign jurisdiction.

I B. *Conflict between* (a) *'Local' or 'Territorial' Law, and* (b) *Private International Law as interpreted by the same Court.*

English courts quite unblushingly give judgment in cases, under that branch of the law that Prof. Dicey calls 'Local' or 'Territorial,' while they admit at the same time that the judgment cannot be supported on principles of private international law, even as interpreted by themselves. 'The Court almost admittedly claims for itself a jurisdiction more extensive than it would concede to foreign tribunals[1].' This has been referred to (*ante*, p. 416) incidentally, in connexion with the rule that English courts will not enforce a default foreign judgment against a British subject not resident within the jurisdiction of the foreign court at the time of the judgment.

It may be here noted, in passing, that English courts adopt the same rule in regard to Colonial judgments, even where service has been made out of the jurisdiction under the authority of a Colonial statute, or Rule of Court, in precisely the same terms as Order XI of the English Rules of Court.

A good example of the conflict between the two branches of law, and the rather anomalous position that Parliament has placed the English Courts in, is furnished by cases arising under Order XLVIII A. This is admittedly one of the most complicated and difficult Orders to interpret and to apply. Rule 1 of the Order provides that any two or more persons . . . being liable as co-partners and carrying on business within the jurisdiction may . . . be sued in the name of the respective firms, &c., &c. Rule 3 provides that the writ may be served either upon any one or more of the partners, *or at the principal place within the jurisdiction of the business of the partnership* upon any person having at the time of service the control or management of the partnership business there; and . . . *such service shall be deemed good service upon the firm . . . whether any of its members are out of the jurisdiction or not, and no leave to issue a writ against them shall be necessary.*

The view taken by Sir T. Piggott[2] that these rules do not apply

[1] Dicey, 2nd ed., p. 47; cf. also p. 49.
[2] Service out of the Jurisdiction (1892), p. 92.

to foreign firms is not supported by the later cases, and so far as *Grant* v. *Anderson* [1] supports this view, it must be considered overruled by *Worcester City and County Banking Co.* v. *Firbank & Co.*[2] and subsequent cases. We have the result, then, that a judgment may be recovered against 'two or more persons,' though foreigners, in the name of the firm, without any service on them, without the necessity or pretence of an order for service *ex juris*, and in any class of personal action whether coming within the classes of action mentioned in Order XI or not. This judgment would be enforceable in England by execution, not only against the firm's property, but also by leave against any members (though foreigners) of the partnership, so far as they possessed property within the jurisdiction; and not only this, but *semble* that the judgment would be *res judicata* and a good basis of an action in England against the individual members of the firm, supposing that they came within the jurisdiction at any subsequent date [3].

Now it was practically admitted by Lord Esher M.R., in *Western National Bank, &c.* v. *Perez* [4], as argued by counsel (though this case was under the old rule and the majority of the court followed *Russell* v. *Cambefort* [5]), 'that no foreign court would enforce in its own country a judgment obtained in this country, procured under the rules and orders in the manner above described. That may be so as to the partners not actually served and as to their shares in the partnership property.' Then he adds: 'But, supposing the judgment would be ineffectual abroad, it may well stand as a valid judgment in this country, effectual against any partnership or personal property which may hereafter come into this country.'

The new rules introduced in June, 1891 (Order XLVIII A) not only adopt Lord Esher's views, but, it is submitted, extend the effect of the judgment as stated. Foreigners might perhaps be excused for saying that English courts thus appear in the ambiguous position of declaring that such a judgment is contrary to their own principles of international law, and yet granting it under the Rules of Court, with all the consequences before pointed out; and they might add with some degree of plausibility, that it would appear to be one of those cases where the proceedings of their own courts offend against English views of substantial justice [6].

II A. *English and Colonial Default Judgments compared.*

Colonial judgments are treated in England, and in the different colonies among themselves, as also in the different Provinces of the

[1] [1892] 1 Q. B. 108.
[2] [1894] 1 Q. B. 784 (C. A.).
[3] *Clark* v. *Collins*, 9 Q. B. D. 355.
[4] [1891] 1 Q. B. at p. 313.
[5] 23 Q. B. D. 526.
[6] See *Pemberton* v. *Hughes*, *ante*.

Dominion of Canada, as between each other, as foreign judgments[1]. Conversely, English judgments are treated in the Colonies as foreign judgments, but with a distinction to be presently noted[2].

A Colonial default judgment against an Englishman (or British subject) not resident in the Colony is not deemed an 'effective' judgment when sued on in England. The English courts do not admit that Englishmen (or British subjects?) resident in England can be made subject to the jurisdiction of Colonial courts by virtue of a Colonial statute authorizing service out of the jurisdiction, though in terms identical with the English Order XI. This seems to be so firmly established as the view of English jurisprudence that there do not appear to be any direct authorities in the books[3].

The converse, however, is not true; and English judgments founded on service *ex juris* against a British subject are generally recognized as valid and effective where sued on in the Colonies. This again seems to be so generally accepted as a matter of course that there appear to be no express authorities[4].

Unless we are estopped by the maxim, 'Communis error facit jus,' the *rationale* of these positions seems worth investigating, however great the temerity of the present writer in attacking the subject.

If an English default judgment is to be held *valid* in the Colonies, and a Colonial default judgment *invalid* in England, it can only be (1) on account of some superior virtue in the English Order XI over the corresponding Rules of Court in the Colonies; or (2) on account of some superior and extra-territorial powers in the English courts that are absent from Colonial courts; otherwise the generally accepted notion that English default judgments are *effective* everywhere in the British dominions must be wrong in international law.

[1] *Houlditch* v. *Marquis of Donegal*, 2 Cl. & F. 470.

[2] *McFarlane* v. *Derbishire*, 8 U. C. Q. B. 12.

[3] The principle is involved in *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* [1894] A. C. 670; *Deacon* v. *Chadwick*, 1 O. L. R. 346. That *Deacon* v. *Chadwick* (1 O. L. R. 346) is too broad in its terms—the decision, it is submitted, should have been limited to the 'effectiveness' of the judgment in the international sense, the American authorities followed being false analogies in municipal law of a British colony—and that the law laid down by *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* was not then considered settled, see *Ashbury* v. *Ellis* [1893] A. C. p. 344.

[4] See *Moritz* v. *Canada Wood Specialty Co.*, 9 O. W. R. 522, 887. Service *ex juris* was allowed by Jelf J. in an action in the H. C. of J. in England, and interlocutory judgment entered in default of appearance—damages were assessed by the sheriff of the county of London, and final judgment entered for damages so assessed and costs. The defendants were sued on the judgment in Ontario and set up in their defence that the Court had no jurisdiction. The reply set out that defendants were a *British* corporation, and subject to the jurisdiction of the English court. The report of the case is very imperfect, but the 'effectiveness' of the judgment in Ontario (assuming that it was a proper case for service *ex juris* under Order XI) does not seem to have been considered either by counsel or the learned judge (Riddell J.) open to question. (It is assumed that the head office of the defendant corporation was not in England, though it is not clear from the report what is meant by the allegation in the reply that the company was a *British* corporation.)

II B. *English and Colonial Legislation respecting the Jurisdiction of Courts of Justice compared on principles of Constitutional Law.*

It is submitted that the English courts—apart for the moment from a consideration of Order XI—have no greater inherent powers, territorial, extra-territorial, or otherwise, than *similar* courts in the Colonies.

Let us compare the powers and jurisdiction of the High Court of Justice in England with that of the Supreme Court of Alberta, to take the youngest province of the Dominion of Canada as an example.

The Supreme Court of Judicature Act in England, sect. 16, provides:

'The High Court shall be a Superior Court of Record, and subject as in this Act mentioned there shall be transferred to and vested in the High Court the jurisdiction which, at the commencement of this Act, was vested in, or capable of being exercised by, all or any of the Courts following (that is to say),—

'(1) The High Court of Chancery, as a common law court as well as a court of equity, including the jurisdiction of the Master of the Rolls, as a judge or master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a common law court;

'(2) The Court of Queen's Bench;

'(3) The Court of Common Pleas at Westminster;

'(4) The Court of Exchequer, as a court of revenue, as well as a common law court;

'(5) The High Court of Admiralty;

'(6) The Court of Probate;

'(7) The Court for Divorce and Matrimonial Causes;

'(8) The London Court of Bankruptcy;

'(9) The Court of Common Pleas at Lancaster;

'(10) The Court of Pleas at Durham;

'(11) The Courts created by Commissions of Assize, of Oyer and Terminer, and of Gaol Delivery, or any of such Commissions.'

The Supreme Court Act of the Province of Alberta provides:

'The court shall within the province and for the administration of the laws for the time being in force within the province, in addition to any other jurisdiction, rights, powers, incidents, privileges and authorities which immediately prior to the coming into force of this Act were vested in or capable of being exercised within the province by the Supreme Court of the North-West Territories, possess the jurisdiction which on the fifteenth day of July, one thousand eight hundred and seventy, was vested in, or capable of being exercised in England by:

'1. [illegible]urt of Chancery [illegible]mon Law Court, as well as a C[illegible] including th[illegible]n of the Master of the

Rolls, as a Judge or Master of the Court of Chancery, and any jurisdiction exercised by him in relation to the Court of Chancery as a Common Law Court;

'2. The Court of Queen's Bench;

'3. The Court of Common Pleas at Westminster;

'4. The Court of Exchequer as a Court of Revenue, as well as a Common Law Court;

'5. The Court of Probate;

'6. The Court created by Commissioners of Assize and Oyer and Terminer and of Gaol Delivery, or any of such Commissions.

(2) 'The jurisdiction aforesaid shall include the jurisdiction which, at the commencement of this Act, was vested in or capable of being exercised by all or any one or more of the judges of the said courts, respectively, sitting in court or chambers, or elsewhere, when acting as judges or a judge in pursuance of any statute, law or custom; and all powers given to any such court, or to any judges or judge, by any statute; and also all ministerial powers, duties and authorities, incident to any and every part of the jurisdiction so conferred [1].'

The Alberta statute is of exactly the same efficacy and authority as the Act of the British Parliament. It is a mistake, as complete as it is common, to speak of the powers 'delegated' to a Colonial Legislature [2]. That the Legislature of the Province of Alberta in any sense exercises *delegated* powers is a notion that the most elementary study of the Canadian constitution will effectually dispel. On the contrary, within its sphere of action, it has plenary powers of legislation, and can exercise them in as free and ample a manner as the British Parliament—the only limitations being those contained in the B.N.A. Act itself, and the implied limitation that it cannot legislate on matters of Imperial concern, or repugnantly to Imperial legislation within the meaning of the Colonial Laws Validity Act [3]. Were it not for the constant recurrence of passages such as I have noted from Sir F. Piggott's work, it would have seemed quite unnecessary to state this elementary principle of constitutional law.

The powers then of the Alberta Supreme Court being practically identical with those of the High Court of Justice are limited *territorially* in exactly the same way. This is very clearly stated by Sir F. Piggott [4].

'The territorial area within which courts have jurisdiction is, in ordinary cases, coterminous with the territorial area over which

[1] The Supreme Court Act of the Province of Alberta, 7 Edw. VII, cap. 3.

[2] See Piggott on Service out of the Jurisdiction (1892), p. 201.

[3] Clement, Canadian Constitution, 58. *Phillips* v. *Eyre*, L. R. 6 Q. B. 20; *Q.* v. *Burah*, 3 App. Cas. 889; *Russell* v. *Reg.* 7 App. Cas. 829; *Hodge* v. *Reg.* 9 App. Cas. 117; *Maritime Bank of Canada* v. *Rec.-Gen. of New Brunswick* [1892] A. C. 437.

[4] Service out of the Jurisdiction (1892), p. 4.

the sovereign rules. But in the case of a composite kingdom, such as that ruled over by the Queen of England, it is necessary to introduce a limitation to the general principle. The territorial area of the different courts of the Queen is limited to that part of the dominions within which they are established; for the courts of England, Scotland [1], Ireland, these areas are England, Scotland, and Ireland respectively. For the courts of India and the Colonies, the areas are the Presidencies and the Colonies respectively.'

So it is evident that we have to look further than to the general powers of the High Court in England to find any superior efficacy in its writs or processes over those of Colonial courts.

II c. *English and Colonial Legislation respecting Service out of the Jurisdiction compared.*

This brings us to Order XI of the Rules of Court. Now in what respect is the English statute of greater efficacy than similar Colonial statutes? The principal object of the Parliament of Great Britain and Ireland, and of the Colonial Legislatures, is the same, and it may shortly be stated to be to repeal the maxim—'The King's writ does not run beyond the sea.'

The English and the Colonial Rules of Court alike affect three classes of persons:—

(1) Foreigners.

(2) British subjects resident in foreign parts.

(3) British subjects resident in other portions of the King's dominions than that within the territorial area of the respective courts.

As against foreigners, the service *ex juris* is alike ineffective: except from the standpoint of municipal law the courts thereby obtain no 'effective' jurisdiction in an action *in personam* [2]. As against British subjects resident in foreign parts, the efficacy of the service is perhaps doubtful in either case. The case comes within the fourth proposition laid down in *Russell* v. *Cambefort* [3]. In any event the efficacy of the writ is dependent on the principle of *allegiance*, which will be dealt with presently [4]. As against British subjects resident in other portions of the King's dominions, &c., English jurisprudence holds that the service of the King's writ

[1] Cf. *McIver* v. *Burns* [1895] 2 Ch. 630.

[2] Dicey, 2nd ed., Rule 83 and notes.

[3] (23 Q. B. D. 526), but see Piggott, Service out of the Jurisdiction (1892), p. lxii; pp. 57–8.

[4] The question of whether the writ, or only notice of it, should be served on foreigners, seems practically a mere matter of diplomacy, etiquette, or polite manners, though the principle of the thing *may* have some bearing on the main question.

issued by the English court is 'effective,' while the service of the King's writ issued by the Colonial court is 'ineffective.'

It must be remembered that process of the Colonial court runs in the King's name just the same as process of the English court—the writ in each case is equally the mandate of the sovereign, and if jurisdiction is to depend on *allegiance* it is difficult to see why a British subject, in British territory, is not bound to obey the King's writ whether issued by a court in England or a court in the Colonies.

The answer that is made to this position is, of course, this: It is only by virtue of statute that the King's writ runs beyond the sea. The Parliament of Great Britain and Ireland can legislate *imperially* for all the King's dominions; whereas the Colonial Parliaments can only legislate for their respective colonies. Thus, speaking of the powers of the Provinces of Manitoba and Ontario, Armour C. J. O. says[1]: 'And to neither is any power given to pass laws having any operation outside its own territory.' An exactly similar limitation, however, applies to the Imperial Parliament: *it is only when it is legislating 'imperially'* that its statutes have any operation beyond the limits of England, or at any rate of Great Britain. The question does not appear to[2] be governed by the Colonial Laws Validity Act[3] by which it is enacted that 'any colonial law which is or shall be repugnant . . . to the provisions of any Act of Parliament extending to the colony . . . shall to the extent of such repugnancy . . . be void . . . and inoperative.' The question is rather whether the Colonial statute trenches upon the Imperial domain of legislation.

'Colonial Acts in one respect differ from Imperial, that they can have no extra-territorial effect even as to British subjects unless express power of extra-territorial legislation is conceded to the colony by an Imperial Act or Charter[4].'

On the other hand, 'the British Parliament possesses the power to impose restrictions and disabilities and incapacities upon any British subject which shall operate upon him anywhere[5].' But whether any particular Act of Parliament purports to bind British subjects abroad will always depend upon the intention of the Legislature, which must be gathered from the Act in question[6].

The question then narrows itself to an inquiry whether (*a*) the English Statute purports to bind British subjects abroad, and

[1] *Deacon* v. *Chadwick*, 1 O. L. R. 346.

[2] This is so decided in *Ashbury* v. *Ellis* [1893] A. C. 341: 'It is not contended that the rules in question are repugnant to the laws of England. In fact they are framed on principles adopted in England.'

[3] 28 & 29 Vict. cap. 63, s. 1.

[4] Hardcastle on Statute Law, 456.

[5] *Sussex Peerage* case (1844) 11 Cl. & F. 86.

[6] Hardcastle, 423.

(*b*) whether the Colonial Acts trench upon the Imperial domain of legislation.

In *re Busfield*[1] Cotton L. J. says:

'Generally courts exercise jurisdiction only over persons who are within the territorial limits of their jurisdiction. If an Act of Parliament *gives them jurisdiction* over British subjects wherever they may be, such *jurisdiction* is valid, but apart from statute, a court has no power to exercise jurisdiction over any one beyond its limits.'

The italics are the writer's. But does the Act of Parliament (i. e. Order XI) give or profess to give 'jurisdiction over British subjects wherever they may be'? If so, then the Act equally gives jurisdiction over *foreigners*, for except in the matter of serving notice of the writ instead of the writ itself, there is no distinction in Order XI between foreigners and British subjects, and we are at once face to face with the difficulty, referred to in Piggott[2] and discussed to some extent by Cotton L. J. in *ex parte Blain*[3]. The Judicial Committees in *Lopez* v. *Barden*[4] state that 'the British Parliament certainly has no general power to legislate for foreigners out of the dominions and beyond the jurisdiction of the British Crown.' Even viewed in the light of municipal law, the remarks of Brett L. J. in *ex parte Blain*[3] are worthy of careful note:

'Foreigners not domiciled here and not present in this country could not be made subject to the English bankruptcy law unless they had committed an act of bankruptcy in England.'

And in the same case James L.J. says:

'The whole question is governed by the broad, general, universal principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English court to give effect to an English statute, is applicable only to English subjects or to foreigners who, by coming into this country, whether for a long time or a short time, have made themselves during that time subject to English jurisdiction.'

III. *Is English Order XI to be regarded as Local or Imperial Legislation?*

Bearing these principles in mind, let us proceed to examine the legislative qualities of Order XI.

In the first place: On its face Order XI does not profess to be *imperial* legislation. If the Judicature Act had enacted that all of Her Majesty's courts wherever situated should have power to allow service out of the jurisdiction, &c., or that British subjects wherever

[1] (1886) 32 Ch. D. 131. [2] p. lx. [3] 12 Ch. D. 522. [4] *Ante.*

resident should be bound for all purposes by judgment, default, or otherwise, entered in pursuance of its provisions, that might be considered *imperial* legislation in the true sense, even without more express words making the enactment applicable in all British colonies and dominions. Order XI, however, is expressly confined to the 'Court' in England. All it says is that 'service out of the jurisdiction of a writ of summons *may be allowed* by the Court or a Judge, &c., &c.' In other words the Court may disregard the rule that the King's writ does not run beyond the sea; though there seems no doubt that by the combined operation of Order XI, XII, and XIII, a new jurisdiction is actually conferred on the Court, viz. to proceed *in absentia* against foreigners and British subjects (*a*) served abroad, (*b*) served in the King's dominions. But the Court is still a court subject to limitation as to its territorial area; any judgment it may enter is purely an *English* judgment, not a British judgment, much less an Imperial judgment. Its judgment is a 'foreign' judgment just as much in the Colonies as in France or Germany: execution of the judgment is 'ineffective' beyond the limits of its territorial area—England. No one, it is submitted, at the present day would contend that the High Court of Justice in England has concurrent jurisdiction with the High Court of Justice in Ontario, which was the principle upon which the Court of Queen's Bench at Westminster acted in issuing a Writ of Habeas Corpus into Upper Canada in 1837[1].

No doubt a British subject is bound to obey the King's writ, but this is by reason of his allegiance to the *King*—there can be no 'allegiance' to a *Court*; and, be it remembered, the King's writ also issues out of the King's Courts in the colonies.

There is nothing in Order XI commanding a British subject to obey its provisions—no penalties for disobedience, no special provision as to the results that are to follow in case of default in entering appearance. In no respect (except in the matter of serving notice of the writ, a provision applicable alike to foreigners and to British subjects resident in foreign lands) is there any distinction drawn by Order XI between foreigners and British subjects out of the jurisdiction, whether resident in foreign or British territory. The Rules of Court are, it is true, to be construed as part of the statute[2]; but the statute is to be construed as dealing with procedure, not with substantive rights[3], and further as not infringing

[1] In *re Anderson*, 30 L. J. Q. B. 129. But see 25 Vict. cap. 20, passed in consequence of this decision.

[2] *Garnett* v. *Bradley*, 3 App. Cas. 964; *Snelling* v. *Pulling*, 29 C. D. 85.

[3] *McDonald* v. *Tacquah Gold Mines* (per Fry L.J.), 13 Q. B. D. 537; *Queen* v. *Gyngall* [1893] 2 Q. B. 239 (per Lord Esher M.R.); in *re Mills*, 34 Ch. D. p. 33; cf. *Vitart* v. *Coles*, 24 Q. B. D. 364.

on recognized principles of international law. It is the duty of the Courts—and this is as applicable to courts in the Colonies as to courts in England—to so interpret the statute as to do as little violence as possible to recognized principles of international law[1].

In short, the contention here put forward is that Order XI is a *municipal* law—a matter of special jurisdiction and procedure in the Courts, effective only in England, and not rendering a British subject resident beyond the territorial limits under any greater liabilities than a foreigner. The statute does not say, or even imply, it is submitted, that a British subject wherever resident may be sued on a judgment based on service *ex juris*—that would have been Imperial legislation in the true sense—but Parliament, aware that the Courts have determined that a Colonial judgment is a 'foreign' judgment in England, and an English judgment a 'foreign' judgment in the Colonies, has left the international (which *pro hac vice* includes the Colonial) aspect of the question severely alone. That this is the true view to be taken as to this legislation, when considered in its constitutional—its *imperial*—aspect is strongly supported by the *ratio decidendi* of the Judicial Committee in *Ashbury* v. *Ellis*[2]. The appellant in that case, an Englishman, residing in London, moved to set aside an order granting leave to the respondent (the plaintiff in the action) to issue writ and to proceed thereon without service, *in absentia*, issued by the Supreme Court of New Zealand, under a statute authorizing such procedure, where the 'defendant is absent from the colony . . . and has no attorney or agent . . . who will accept service.' It was contended that this was *ultra vires*, 'for that the legislature has no power except over its own subjects.'

Lord Hobhouse, delivering the judgment of their Lordships, says:

'His [the appellant's] broad contention is, that the Act of Parliament (15 & 16 Vict. c. 72) which gives the legislature of New Zealand power to "make laws for the Peace, Order, and good Government[3] of New Zealand, provided that no such Laws be repugnant to the Laws of England," does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the colony. It is not contended that the rules in question are repugnant to the laws of England. In

[1] 'But when the words used are capable of one or other construction, then the court ought to adopt the construction which will prevent an infringement upon the principles of international law by extending the jurisdiction of the English courts against foreigners residing abroad, who have in no way submitted to that jurisdiction.'

[2] [1893] A. C. 339.

[3] Cf. B. N. A. Act, 1867, ss. 91 and 92; B. N. A. Act, 1871, s. 4; *Riel* v. *Reginam*, 10 App. Cas. 675.

fact, they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory.'

Then after referring to the special circumstances, which made this particular concrete case 'not a very favourable case for denying the right of the New Zealand authorities to try the question at issue between these parties,' the judgment proceeds:

'Of course they have framed their law in more abstract and flexible terms[1]. But, taking those terms, their Lordships are clear that it is for the peace, order, and good government... that the Courts of New Zealand should . . . have the power of judging whether they will or will not proceed in the absence of the defendant. The power is a highly reasonable one. *So far as regards service of process not within their local jurisdiction . . . the English Courts have it conferred on them by the Imperial Parliament*[2]. The New Zealand legislature, it is true, has only a limited authority; but in passing the rules under discussion, it has been careful to keep within its limits.

'But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand... this argument... is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case[3].'

IV. *Suggestion for a Final Conclusion.*

Perhaps the true interpretation is that an *Englishman*, as distinguished from a British subject, at home or abroad, would be liable on a default judgment entered in the English courts pursuant to Orders XI, XII, and XIII, within the meaning of Dicey's Rule 80, Case 2. 'Where the defendant is at the time of the judgment in the action a subject of the sovereign of such country,' i.e. that 'country' means the 'law district' of 'England,' not the British Empire[4], and 'sovereign' means the *English* sovereign—not the King, Rex et Imperator, Sovereign of the British Empire.

If this is not in effect what Prof. Dicey's rule means, then his rule is in terms wide enough to give *effective* jurisdiction to the courts of any colony (i.e. 'foreign' country) over any British subject wherever resident, since they are all '*subjects of the sovereign of such country.*'

[1] The terms have already been sufficiently indicated.
[2] Italics the writer's. It does not seem that the word 'Imperial' is here used in contradiction to 'British.'
[3] Compare *McIver* v. *Burns* [1895] 2 Ch. 636. 'To call a Scotsman an English subject is a perfect absurdity' (per Rigby L.J.).
[4] See Dicey's definition of 'country,' p. 67, 2nd ed.

The interpretation suggested brings Order XI into harmony with the principles of international law and the decisions of the Courts [1], and prevents the anomaly of an English default judgment *ex juris* being 'effective' in the Colonies, while a similar Colonial judgment is 'ineffective' in England: it would also recognize the validity of similar Colonial legislation as purely municipal law, just as it is only on the basis of municipal law that default judgments are entered in England against absent foreigners.

If there is anything in this argument that default judgments, whether of English or Colonial courts, are alike 'ineffective,' there would appear to be ample reason for the suggestion made by Sir F. Piggott ('Service out of the Jurisdiction') that the Imperial Parliament might very well introduce legislation, providing for the reciprocal effectiveness of these judgments between all parts of the British Empire.

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[1] See especially *Deacon* v. *Chadwick*, *Dakota Lumber Co.* v. *Rinderknecht*, *McIver* v. *Burns*, *Ashbury* v. *Ellis*, all cited *ante*.

In the Province of New Brunswick, it is provided by statute: 'In any action ... on a foreign judgment where the defendant was not personally served with the original process... within the jurisdiction of the court where the said judgment may be obtained, it shall be competent for the defendant to enter into the subject-matter of such foreign judgment, and to avail himself of any matter of law or fact which would have been available as a defence, &c., &c.' (See *Star Kidney Pad Co.* v. *McCarthy*, 26 N. B. Reports. 107.)

If the English Order XI is to be regarded as Imperial legislation, this statute would appear to be *ultra vires* on the ground of 'repugnancy' within the meaning of the Colonial Laws Validity Act. The same principle would seem to apply if a Colonial legislature were to pass a statute enacting that no action should lie on a foreign judgment.

INTERESTS FOR LIFE AND QUASI-REMAINDERS IN CHATTELS PERSONAL.

IT is a commonplace of textbooks on the law of personal property that the legal ownership of chattels is indivisible and cannot be disposed of in such a manner as to create successive interests, except by the expedient of vesting it in trustees. In other words, that no interest in the nature of a remainder or a reversion can be created in chattels otherwise than by way of trust. At the same time it is pointed out that an exception, in substance although not in form, has been long recognized in the case of a bequest of a term of years to one person for life and then over to another, by the application of a doctrine similar to that of executory devises of land. By this doctrine the whole term was held to vest in the life-tenant, and on his death to shift by way of 'executory bequest' to the ulterior legatee. The current opinion is that this doctrine has been extended to chattels personal also (with the exception of consumable things), and that it is the only way in which a future legal interest can be created in chattels. This view is supported by the authority of Preston (Abstracts of Title, vol. ii, p. 144), Butler (Note on p. 401 of Fearne's Contingent Remainders), Lewis (Law of Perpetuity, pp. 95–6), and Jarman (Wills, 5th ed., vol. i, p. 838). It does not, however, receive the assent of Williams, who cautiously remarks (Personal Property, 16th ed., p. 356), 'It may be doubted whether the doctrine of executory bequests is applicable in law to any other chattels than chattels real,' and it is disputed by Professor Gray of Harvard (Rule against Perpetuities, 2nd ed., § 85 et seq.). Nor does it appear to have the support of Fearne (Contingent Remainders, 10th ed., pp. 413–14).

Whether a future legal interest after a life interest in chattels can be created by deed does not appear to have been the subject of any authoritative decision, but Blackstone expressly states that it may. The passage on the subject is at p. 398 of vol. ii of his Commentaries and is an almost verbatim transcript of a passage in a manuscript treatise of Lord Chief Baron Gilbert, unpublished at the time Blackstone wrote, but afterwards embodied in the article on 'Remainder and Reversion' in Gwillim's edition of Bacon's Abridgment. It is as follows:

'By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were generally tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels in remainder after a bequest for life were permitted: though originally that indulgence was only shown, when merely the use of the goods, and not the goods themselves, was given to the first legatee; the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded: and therefore if a man *either by deed or will* limits his books or furniture to *A* for life, with remainder over to *B*, this remainder is good.'

Williams deals with the matter thus:

'The strict and ancient doctrine of the indivisibility of a chattel, though retained by the Courts of law, had no place in the modern Court of Chancery, which, in administering equity, carried out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to *A* for his life and after his decease to *B*, *A* was merely entitled to a life interest, and *B* had, during the life of *A*, a vested interest in remainder of which he might dispose at his pleasure, and the Court of Chancery would compel the person to whom the Courts of law might have awarded the legal interest to make good the disposition' (Personal Property, 16th ed. p. 358).

He does not appear to confine himself to future interests in chattels created by will, but as the authorities he cites (Fearne, p. 407, and *Conduitt* v. *Soane*, 1 Coll. 285) are concerned solely with bequests, it would be unsafe to rely on this passage as supporting the view that an interest in the nature of a remainder can be created in chattels personal by deed.

It will be apparent from the foregoing that the manner in which limited and future interests in chattels personal, not created by way of trust, would be regarded by the Courts at the present day admits of considerable room for doubt. It is clear that in a gift by will of chattels, with the exception of chattels *quae usu consumuntur*, to *A* for life, and on his death to *B*, *B*'s interest would be protected; but the principle on which the Courts would proceed is not very clear on the authorities. It is probable that the same may be said of a similar gift by deed, although there is an entire absence of English authority on the point other than the passage from Blackstone already quoted.

Three possible solutions of the question present themselves for consideration.

I. *A* may be regarded as having simply the use of the chattels for life, the property being vested in *B*.

II. *A* may be regarded as having the absolute ownership with an executory gift over in favour of *B*.

III. *A* may be regarded as taking the property subject to a trust over in favour of *B*.

The adoption of one or other of these views by the Courts may lead to consequences of considerable practical importance. Thus, if either of the first two views is followed, on an alienation of the chattels by *A*, the purchaser, whether taking with notice of *B*'s interest or not, would be exposed to an action at the suit of *B*, after *A*'s death, for the recovery of the chattels or for damages for their conversion. If the third view is correct, a purchaser for value from *A*, without notice of *B*'s interest, would obtain a valid title to the chattels.

As is pointed out by Professor Gray (Rule against Perpetuities, p. 67), it is immaterial for most purposes which of the first two views is adopted, but it is of importance with reference to two questions, viz. (1) the operation of the Rule against Perpetuities and (2) in a gift of a limited interest, whether there is any reversionary interest left in the settlor.

An examination of the authorities points to the first view as being the true solution of the question, although the second is the one adopted by most modern textbooks.

The early Common Law did not recognize any kind of limited ownership in chattels. 'A gift or devise of a chattel for an hour is for ever.' The first departure from this strict doctrine was effected by drawing a distinction between a gift of the use or occupation of a chattel and a gift of the chattel itself. The earliest case in which this distinction appears to have been taken is a case in the Year Book of 37 Henry VI (1459), the best account of which is contained in the argument in *Paramour* v. *Yardley* (Plow. 539):

'But the case in 37 H. VI differs much from this case. For there the case was that *A*, being possessed of a book called the Grail, devised it to *B*, one of his executors, to have the occupation of it during his life, and that after his death *C* should have it in the same manner for his life, and that after his death it should be disposed of by his executors to the use of a church, and died, and *B* took the said book and kept it by force of the devise and delivered it to the wardens of the said church, and died, and *C* took the book, and the churchwardens brought an action of trespass against him: and it was the clear opinion of the Court that the action was maintainable, because the book was never delivered to *C* by the

executors, and the occupation or possession of *B* was no execution of the legacy to *C*, because nothing was devised to *B* but the occupation, and the like to *C*, for the devise proves in itself that the property of the book was always in the executors to the use of the testator, to the intent that they should dispose of it to the use of the church, *and the occupation is a distinct thing from the property.*'

In the Year Book, Prisot (Chief Justice of the Common Pleas) is reported as saying that the property in the book was in the executors and that the legatees had only the occupation and 'manurance' for the term of their two lives.

Another case is mentioned in Owen's Reports as being referred to by Dyer (Chief Justice of the Common Pleas) in 7 Eliz. (1565):

'Note by Dyer, that the Lord Fitzjames, late Lord Chief Justice of England, did devise his land to Nicholas Fitzjames in tail, with divers remainders over, and in the same devise he devised divers jewels and peeces of plate, viz., the use of them, to the said Nicholas Fitzjames and the heires males of his body. In this case it was the opinion of the Court that the said Nicholas had no property in the said plate, but only the use and occupation. And the same law where the devise was that his wife should inhabit in one of his houses which he had for terme of years, during her life, because the wife takes no interest in the terme, but onely an occupation and usage, out of which the executors cannot eject her during her life, but Walsh held the contrary.'

It appears from this case that the distinction between a devise of the use or occupation and a devise of the thing itself was being made in the case of terms of years also, although, at first, the judges had refused to recognize it in the case of interests in land, the devise of the occupation of a term being regarded as a devise of the land itself (*Paramour* v. *Yardley*).

The distinction disappeared first in the case of terms of years. It was found that the Court of Chancery was beginning to intervene by allowing bills to be brought by the remainderman to compel the first devisee to give security, and this appears to have led the Common Law Courts to reconsider their attitude in the matter. In *Mallet* v. *Sackford* (1607) Cro. Jac. 198, there was a division of opinion as to whether a gift over of a term of years after a devise for life was valid. Shortly after, in *Matthew Manning's* case (8 Co. 95a) the ulterior devise was held to confer a legal estate by way of executory devise, and it was held that it was immaterial whether the gift was of the term or of the use of the term. This case was followed in *Lampet's* case (10 Co. 46 b), and since that decision the law on the subject has been considered settled.

The distinction continued longer in the case of personal chattels, with the result that the cognizance of limitations of future interests

in personal chattels fell almost entirely into the hands of the Court of Chancery.

Thus, in a case in the Common Pleas in 1641, quoted by Professor Gray (Rule against Perpetuities, p. 64), we find the Chief Justice (Banks) distinguishing between a bequest of the use and occupation of goods and a bequest of the goods themselves:

'For where the goods themselves are devised, there can be no remainder over; otherwise, where the use or occupation only is devised. It is true that heirlooms shall descend, but that is by custom and continuance of them, and also it is true that the devise of the use and occupation of land is a devise of the land itself, but not so in case of goods, for one may have the occupation of the goods and another the interest, and so it is where a man pawns goods and the like.'

The contrast between a gift of the use of chattels and a gift of the chattels themselves appears later in *Vachel's* case (*Vachel* v. *Vachel & Lemmon* (1669) 1 Ch. Ca. 129). It was, however, disregarded in *Catchmay* v. *Nicholas & Morgan* (1673) Cas. temp. Finch 116, and *Shirley* v. *Ferrers* (1690) 1 P. W. 6 (in note), and was finally disposed of in the case of *Hyde* v. *Parratt* (1 P. W. 1; 2 Vern. 331) in 1695. Fearne remarks on the two earlier cases that the legatee for life was also executrix, and as such held to be a trustee in respect of the limitation over; hence the old distinction between the use of the thing and the thing itself might not be considered as completely abandoned, on account of her taking the thing itself as executrix, and the use only constructively as legatee for life.

In Freeman's Cases in Chancery (p. 206) there is a reference to an anonymous case (probably *Hyde* v. *Parratt*) in these terms:

'A devise of goods to *A* for life, with remainder after the decease of *A* to *B*; it is now clearly settled that it is a good devise to *B*, and that *B* may exhibit a bill against *A* to compel him to give security that the goods shall be forthcoming at his decease: and is all one whether the goods or the use of the goods be devised for life.'

The case of *Hyde* v. *Parratt* is considered to have finally exploded the distinction between a bequest of the use of a chattel and a bequest of the chattel itself. In that case the testator bequeathed certain chattels to his wife for her life, and after her death to Hyde, Parratt being appointed executor. A bill was filed by Hyde against Parratt and the widow praying that an inventory of the chattels should be taken and that the widow should give security for their being forthcoming at her death. The Lord Keeper (Somers) 'on the strength of the late precedents which, following the civil and

canon laws, had construed the use of the thing and not the thing itself to pass' held the devise over to be good.

Lewis (Law of Perpetuity, p. 96), commenting on this case, says:

'Since this adjudication, it has always been considered perfectly settled that an executory gift of chattels personal, after a prior limitation for life, is equally valid with a similar bequest of a term of years. And this, too, upon the same ground as that assigned in *Hyde* v. *Parratt*, viz., that a gift for life of a chattel is to be construed as a gift of the usufruct only.'

With all respect to so great an authority it is submitted that, although stating correctly the ground of the decision, he has drawn an erroneous conclusion. If the first gift is of the *usufruct* only, there is an immediate gift of the property to the ulterior legatee subject to the usufruct and the doctrine of the executory bequest does not apply.

From the earlier cases in Chancery already mentioned, it is apparent that the Court at first hesitates between the doctrine of a trust incumbent on the person or persons taking a life interest, in favour of the ulterior legatee, and the doctrine of a usufruct in the former. In Freeman's Cases in Chancery (p. 137) the trust doctrine is clearly adopted:

'J. S. deviseth £500 to his daughter, and if she die before thirty years of age unmarried, then to be divided between three; she does receive the money, and dies before that time. And resolved that the money should be divided, and her executor chargeable, as possessed in trust for the devisees in remainder.'

This seems to have been the ground of decision also in the cases of *Catchmay* v. *Nicholas* and *Shirley* v. *Ferrers*, although they are both reconcilable with the other view. But in *Hyde* v. *Parratt* and the later cases, the ground of decision clearly changes to that of the usufruct alone being in the person entitled for life. In *Randall* v. *Russell* (1817) 3 Mer. 190, Grant M.R. remarks, 'A gift for life of a chattel is now construed to be a gift of the usufruct only.'

This doctrine, involving the vesting of the property in the ulterior legatee, has considerable support. Thus, in Comyn's Digest (5th ed. 1822), under the title 'Estates by Devise' we have the following:

'If chattels personal are devised to *A* for life, and if he has a son, to the son; if *A* has no son, or such son dies without issue, to *B* for life, and then to *C*, his son; *A* has no son, and *B* dies in the life of the testator; *the interest vests in C.*'

In *Evans* v. *Walker* (3 Ch. D. 211) the ulterior interest was treated as immediately vesting.

John Brown bequeathed to Maria Evans an annuity of £50 for

her life, and after her decease to her children equally to be divided between them during their lives, and after the decease of the survivor, to go to his nephew E. Walker and two nieces S. B. Walker and E. Walker equally between them. It was objected unsuccessfully that the gift to the nephews and nieces was void for remoteness.

Malins V.-C. (at p. 213) is reported as saying:

'There is no objection to a gift to unborn children for life and then to an ascertained person, provided the vesting is not postponed... Property may be given by will or secured by settlement to an unborn person for life, or to several unborn persons successively for life, with remainders over, provided that the vesting of the remainders, or the ascertainment of those who are to take in remainder, be not postponed till after the death of such unborn person or persons.'

This is the view taken by Professor Gray, and, as he points out, it has been generally adopted by the American Courts, with the exception of the Courts of North Carolina. It is also supported by Williams in the passage already quoted. It is not clear what view of the matter was taken by Fearne. He evidently leant towards the doctrine of a trust binding on the person having the life interest.

'In such cases,' he says, 'if the first taker does not acquire the whole legal interest, upon the delivery from the executors, where is the obstacle to considering him as acquiring only a right to the use or occupation, according to the limited duration of his interest therein; and that the executor should retain the absolute property in trust for him and the legatees over; so as to preserve the right of such ulterior legatees to the possession when their interests are to commence? Or if the whole legal interest be acquired from the executors, on their assent to the possession of the first taker; why may not he be considered as taking it in trust for the ulterior legatees, subject to his own anterior beneficial interest therein? Either of these constructions would clearly warrant the interposition of the Court, even in cases where the disposition was immediate and unattended with an express trust' (Contingent Remainders, p. 414).

It must be admitted, on the other hand, that the balance of authority among modern text-writers is in favour of the doctrine which regards the ulterior interest as executory. Thus Jarman (Wills, 5th ed., vol. i, p. 838) says, 'No remainder can be limited in real and personal chattels; every future bequest of which, therefore, whether preceded by a partial gift or not, is in its nature executory,' reproducing the substance of Butler's note in Fearne (p. 401) which he cites as his authority. Preston takes the same view and is probably responsible for the currency which it has obtained. He says,

'On all future interests arising from dispositions of personal and chattel-real property, it is observable that they cannot, under any of the modes of gift which have been mentioned, give a remainder in the proper sense of the term. They give interests which are in the nature only of remainders. Even in those instances in which one limitation is to wait for effect, till the interest which passes by another limitation is determined; as, to *A* for life, and after his decease to *B*; *B* has no remainder properly so termed. The whole estate is in *A*, till his interest determines by his death' (Abstracts of Title, vol. ii, p. 144).

Lewis, in the passage already quoted, takes the same view.

The only case, however, in which the doctrine of the executory bequest has been adopted by the Courts with reference to personal chattels appears to be that of *Re Tritton, ex parte Singleton* (1889) 6 Mor. 250. In that case, the testator gave to his wife 'the right of possession and enjoyment' of all his pictures during her life (if she should so desire), and, subject to his wife's interest, he bequeathed all his said pictures to his son, H. J. Tritton, for his own absolute use and benefit. The son, during the widow's life, assigned his interest under his father's will and subsequently became bankrupt. The trustee in bankruptcy claimed, contending that the assignment was a bill of sale and void as not having been registered under the Bills of Sale Acts. Mr. Justice Wills held the son's interest to be executory, and not within the Bills of Sale Acts as being a *chose in action*. In giving judgment he said,

'It seems to me clear upon the authorities that you cannot have life estates and remainders out of personal chattels, and that the interest which this lady took is definite and it comes first, and entitles her to the enjoyment and possession of these things—that is, to the property in these things during her lifetime. It seems to me that the interest of the son was an executory bequest, which creates no present or vested interest, and which, if the mother survived him, would never come into operation.'

According to the report, the only authorities in point which appear to have been cited by counsel were the passage in Jarman already referred to and *Manning's* case.

As Professor Gray suggests (Rule against Perpetuities, § 86 a) the application of this doctrine to personal chattels is probably due to overlooking the distinction between chattels real and chattels personal. There is a legal presumption that a life estate is larger than any term of years, but there is no legal presumption that an interest for life in (say) a picture will last longer than the picture itself. The reason given by Banks C. J. for allowing future interests in heirlooms 'by the continuance of them' is equally applicable to all personal chattels of a permanent nature.

Moreover, a case which came before the Courts in 1883, *Re Percy, Percy* v. *Percy* (24 Ch. D. 616), appears directly opposed to the application of the doctrine of executory bequests to personal chattels. The testator, H. J. Percy, bequeathed £10,000 to his wife, 'afterwards the sum to go to the understated residuary legatee, Edward Josceline.' It was held that the testator having made an absolute gift to his wife, the Court could not give effect to a further disposition of the legacy over to another. But the doctrine in question is based on the assumption that the first taker acquires the absolute property and that it shifts over on his or her death; and, if it is to be accepted as correct, then, in cases in which there is an ulterior disposition, it can make no possible difference whether the first gift is absolute or expressly limited to the first taker for life.

On the whole, a survey of the cases appears to lead to the conclusion that the doctrine of the modern textbooks that all ulterior interests in personalty are executory is erroneous, and that in the case of a gift of personal chattels to *A* for life and then to *B*, in a will (and, perhaps, in a deed also), *A* is to be regarded as a usufructuary and the property vests at once in *B*.

DAVID T. OLIVER.

DOMICILE IN COUNTRIES GRANTING EXTERRITORIAL PRIVILEGES TO FOREIGNERS.

CAN a person acquire a domicile in a place where, by virtue of capitulations, treaties, law, or usage, he enjoys exemption from the operation of the ordinary local laws? In its broadest aspect this question involves a consideration of the domicile of diplomatic agents and their suites. It is proposed, however, to limit the present discussion to the acquisition of domicile in countries such as Turkey and China, where citizens or subjects of certain states are governed by their own national law.

The power to acquire a domicile in such countries was denied by Mr. Justice Chitty in the much-discussed case of *Tootal's Trusts*[1]. A contrary view is taken by Judge Wilfley in a case recently decided by the United States Court for China[2]. The increasing number of persons of British and American nationality permanently residing in the Orient makes the question one of considerable practical importance. The English view, it is submitted, is based on erroneous conceptions of domicile and exterritoriality. It is supported by the authority of a single case, has been vigorously attacked, and may yet be repudiated by Courts not bound by the precedent.

In the case of *The Indian Chief*[3] Lord Stowell considered the question of the acquisition of a commercial domicile in the East, and held that the national character of a person engaged in trade in the Orient under the protection of a European association or factory was determined by the character of the association or factory. The case was one relating to enemy character as determined by residence and protection, and did not involve the question of ordinary domicile. Stress was laid on the strong presumption against the acquisition of a domicile in non-Christian and barbarous countries, but there is nothing in the language of Lord Stowell showing that he meant to exclude altogether the possibility of the acquisition of such a domicile.

During the rule of the East India Company in India the English courts were frequently called upon to decide whether persons of

[1] (1883) 23 Ch. D. 532; 11 Clunet, Jour. de dr. int. privé (1884), 85.
[2] *In re Allen's Will.* United States Court for China, Shanghai Term, August 16, 1907. Pamphlet. (Not officially reported.)
[3] (1800) 3 C. Rob. Adm. 12. Cp. *The Danous* (1802) 4 C. Rob. Adm. 255, note b.

British nationality in the service of the Company could acquire a domicile in India. As early as 1790 it was determined[1] that a person whose domicile of origin was Scotland, and who had been an officer in the army of the Company, might be considered as having obtained an Indian, or, as it was termed, an Anglo-Indian domicile. This Anglo-Indian domicile continued even while the person was in his domicile of origin on leave, because he remained subject to the orders of the Company, and might be called upon to return to India[2]. The cases admit that a person though remaining in the service of the Company might, by returning to England or Scotland on leave, regain his domicile of origin[3]. But such a person could not obtain a domicile of choice in a foreign country, such domicile being inconsistent with his duties to the Company[4].

The doctrine of Anglo-Indian domicile was extended to cases of persons not in the service of the Company who had gone to India for the purpose of carrying on their private business, Vice-Chancellor Kindersley rightly observing that there was no distinction between the two classes of cases[5]. The doctrine was held not to apply to the case of persons in the service of the British Crown who were ordered to India, on the ground that their residence in India lacked the permanency that characterized service in the East India Company[6]. The distinction appears to be a sound one, and, if correct, supports the contention of Sir William Rattigan[7] in favour of an Indian domicile for persons in the present East Indian Civil Service.

After the establishment of direct British rule in India, the cases on Anglo-Indian domicile ceased to be of practical importance, except as to persons who had obtained such a domicile prior to that time. The doctrine has been declared an anomalous one[8], and has been sought to be explained by the peculiar political position of the East India Company. Says Turner L. J. in one of the leading cases[9]:

'The government of the East India Company was in a high degree, if not wholly, a separate and independent government, foreign to the government of this country, and it may well have been thought that persons who had covenanted obligations with such a government for services abroad could not reasonably be considered to have

[1] *Bruce* v. *Bruce* (1790) 2 B. & P. 229; *Forbes* v. *Forbes* (1854) 23 L. J. (Ch.) 724; *Hepburn* v. *Skerving* (1861) 9 W. R. 764.

[2] *Munroe* v. *Douglas* (1820) 5 Madd. 379; *Craigie* v. *Lewin* (1843) 3 Curt. 435.

[3] *Attorney-General* v. *Pottinger* (1861) 6 H. & N. 733.

[4] *Hodgson* v. *de Beauchesne* (1858) 12 Moo. P. C. 285.

[5] *Attorney-General* v. *Fitzgerald* (1856) 25 L. J. (Ch.) 743; *Cockrell* v. *Cockrell* (1856) 25 L. J. (Ch.) 730; *Allardice* v. *Onslow* (1864) 33 L. J. (Ch.) 434; *Commissioners of Inland Revenue* v. *Gordon's Executors*, 12 Sess. Cas. 657.

[6] *Attorney-General* v. *Napier* (1851) 6 Exch. 217.

[7] Private International Law, p. 39.

[8] Cp. *Ex parte Cunningham* (1884) 13 Q. B. D. 418; and often.

[9] *Jopp* v. *Wood* (1865) 34 L. J. (Ch.) 212.

intended to retain their domicile here. They, in fact, became as much estranged from this country as if they had become the servants of a foreign government.'

The statement is of interest in that it admits the possibility of the acquisition of a domicile in non-Christian or barbarous States by persons in the government service of such States.

In their results the cases establishing the doctrine of Anglo-Indian domicile are correct. There is no valid reason why a person of British nationality and professing the Christian religion, whether in the service of the East India Company or not, should not have been able to acquire a domicile in India. By the acquisition of such domicile he became subject to certain provisions of the territorial law—no less territorial because it provided that certain persons should be governed by the law in force in England. It has been well pointed out by Mr. Westlake[1] that if a Mohammedan subject of the Ottoman Empire should acquire a domicile in British India at the present time, he would in regard to certain matters, e.g. succession, be governed by Indian law, and more especially by those provisions that are applicable to persons of his religious faith. Yet it would not be seriously contended that the rules of Mohammedan law applied in his case were not the laws of the territorial sovereign.

In *Maltass* v. *Maltass*[2] the question of the acquisition of a domicile in Turkey is discussed by Dr. Lushington. The point at issue was the validity of a will of a British subject whose domicile it was conceded was either England or Turkey. The testator was born at Smyrna, and, with the exception of a few years spent in England during his boyhood for purposes of education, had lived at Smyrna continuously until his death. For a number of years he was engaged in business at that place. It was urged against the validity of the will that the testator had acquired a Turkish domicile, and that under the laws of Turkey no power to make a will existed. Under the Treaty of the Dardanelles (1809) it was provided that in case an Englishman should die within the Turkish dominions, his property should be delivered to the person designated in his will; in other words, the power to make a will was expressly recognized in favour of all British subjects, regardless of their domicile. The question of domicile was therefore immaterial. The learned Judge expressly states:

'My judgment does not affect the question of domicile. If the deceased was in a legal sense domiciled in Turkey, and if the law of domicile does prevail, the law of Turkey in conformity with the

[1] Private International Law (4th ed.), p. 320.
[2] (1844) 1 Rob. Eccl. 67. The facts are stated in s. c. (1842) 3 Curt. 231.

treaty says that in such case the succession to personal estate shall be governed by the British law. If he was not domiciled in Turkey, but in England, then the law of England prevails *proprio vigore.* I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicile; but this I must say—I think that every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte.'

In *In re Tootal's Trusts*[1] the court was asked to apply the doctrine of Anglo-Indian domicile to the acquisition of a domicile in China. The question to be determined was the liability of the estate of Mr. Tootal to pay certain legacy duties, and this depended solely on the domicile of the testator at the time of his death. Mr. Tootal's domicile of origin was England. In 1862 he went to reside at Shanghai, and, with the exception of some visits to England in 1864 and 1873 for health and business, he continued to reside at Shanghai until his death, which occurred in 1878. During his residence at Shanghai he was engaged in extensive business operations at that place. Evidence, which was uncontradicted, was adduced to show that for some years before his death he had determined to reside permanently at Shanghai, and had relinquished all intention of returning to England. In his will he described himself as of Shanghai, in the Empire of China. Against the liability of the estate to pay the legacy duties it was urged that the testator's domicile was not Chinese, but that under certain treaties between Her Majesty and the Emperor of China, and certain statutes and Orders in Council, there existed at Shanghai an organized community of British subjects, independent of Chinese law, exempt from Chinese jurisdiction, and not amenable to the ordinary tribunals of this country, but bound together by law which is English law, and that by residence and choice the testator became a member of this community, and as such acquired an Anglo-Chinese domicile.

Mr. Justice Chitty admits that the evidence was sufficient for general purposes to establish the *animus manendi.* Facts ordinarily sufficing to show the acquisition of a domicile being present, it devolved upon the Court to determine whether there were any circumstances in the case which excluded the application of the general rules of domicile. The Court finds the distinction in the fact that the community of which Mr. Tootal became a member was not the territorial sovereign at Shanghai. 'There is no authority,' says Mr. Justice Chitty, 'that I am aware of in English law that an individual can become domiciled as a member of a community which

[1] (1883) 23 Ch. D. 532; 11 Clunet, Jour. de dr. int. privé (1884), 85.

is not the community possessing the supreme or sovereign territorial power. . . The sovereignty over the soil at Shanghai remains vested in the Emperor of China, with this exception, that he has by treaty bound himself to permit British subjects to reside at the place for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects.' The learned Judge says that it was admitted by counsel that the testator's domicile was not Chinese, and that this admission was rightly made. But he apparently concedes that if the strong presumption against such intention be overcome a domicile might be acquired in China. He rightly observes that domicile is a relation between an individual and a particular locality or country, not a relation between an individual and a particular society or a particular system of law [1]. Here lies the difficulty in the case. Mr. Tootal acquired a domicile in China. He thereby became subject to Chinese law as fully as a person of British nationality becomes subject to French law by acquiring a domicile in France. More particularly he became subject to those provisions of the Chinese law that were applicable to persons of British nationality. It is quite immaterial that the Chinese law provides that persons of British nationality shall be governed by the rules of law prevailing in England, or by such laws as may be enacted and made applicable to them by the English authorities. The English law is operative in Shanghai as to certain persons and certain transactions only because it is permitted and adopted by the territorial sovereign [2].

We must admit the correctness of the statement made by the Court that if an American citizen residing in Shanghai with the intention of remaining there permanently, but not intending to acquire a Chinese domicile, should attach himself to the British community he would not acquire an Anglo-Chinese domicile. The only domicile that can be acquired within the territorial limits of China is a Chinese domicile. If an American citizen should acquire a domicile in China he would thereby submit himself to those provisions of the Chinese law that are applicable to persons who are citizens of the United States. The Court relies in part on the authority of *Maltass* v. *Maltass*, interpreting that case as holding that Mr. Maltass died domiciled in England. It has been shown that the question of domicile was not necessary to the decision in that case, and that Dr. Lushington expressly refused to decide this point.

[1] *Bell* v. *Kennedy* (1868) L. R. 1 H. L. (Sc.) 307; *Udny* v. *Udny* (1869) L. R. 1 H. L. (Sc.) 441.

[2] This principle is recognized in the Act of Congress (34 U.S. St.-at-Large, 814) in reference to the jurisdiction of the United States tribunals in China. Cp. also 5 Moore, International Arbitrations, 5034.

In *Abd-ul-Messih* v. *Farra*[1] the Privy Council in an appeal from the Supreme Consular Court of Constantinople[2] held that the power of testacy in respect of movables of a person who was a member of the Chaldean Catholic community, having a Turkish domicile of origin and Turkish nationality, but who had fixed his permanent residence at Cairo, where he had obtained the *de facto* status of a protected British subject, was governed by the laws of Turkey. The Court rejected the view that the testator's selection of a permanent abode in Cairo under British protection gave him an Anglo-Egyptian domicile.

'That result,' says Lord Watson, 'would doubtless have followed if Cairo had been a British possession governed by English law; but Cairo is in no sense British soil; it is the possession of a foreign government, and subject to the sovereignty of the Porte. . . . The idea of a domicile independent of locality, and arising simply from membership of a privileged society is not reconcilable with any of the numerous definitions of domicile. . . . The law which regulates his personal status must be that of the governing power in whose dominions he resides. . . . There is neither principle nor authority for holding that there is such a thing as domicile arising from society and not from connexion with a locality.'

The case of *Tootal's Trusts* is cited as an authority directly in point. It is to be noted that the person whose domicile was involved retained throughout his Turkish nationality. The question then arises whether by transferring his residence from one portion of the Ottoman Empire to another he could by merely inscribing his name on the British consular register change the law applicable to himself. If under Turkish law he thereby acquired the status of a person of British nationality then his testamentary capacity would be governed by English law, and, as in *Maltass* v. *Maltass*, his domicile would be immaterial. The only domicile that can be acquired in Cairo is an Egyptian domicile. It does not appear that if he had been held to be domiciled in Egypt, as distinguished from domicile with the British community in Egypt, the law governing his testamentary capacity would have differed from that prevailing at his domicile of origin. The case is cited with approval in *Abdallah* v. *Rickards*[3], where the point, however, was not involved.

In re Allen's Will[4] appears to be the only American case on the subject. The testator in this case was born in the State of Georgia, where he resided until he was twenty-four years of age. He then moved to China, where he lived continuously for a period of forty-

[1] (1888) 13 App. Cas. (P. C.) 431.
[2] (1886) 19 Clunet, Jour. de dr. int. privé (1892), 758.
[3] (1888) 4 T. L. R. 612 (per Chitty J.).
[4] (1907) U.S. Court for China, Shanghai Term, 1907. Pamphlet.

seven years, until his death, engaged in his labours as a missionary. His family was reared in China, and his estate, consisting solely of personal property, was accumulated there. He died at Shanghai. He had often expressed his intention to make China [1] his permanent home, but he retained throughout his American citizenship. The question before the Court was that of the probate of the will of this person. The will was good under the common law, which Congress has made applicable to cases before the United States Court for China. It did not appear that the will was good under the laws prevailing at the testator's domicile of origin. In the view that the Court takes of the case the validity of the will depended solely on whether Dr. Allen was domiciled in Shanghai at the time of his death [2].

Judge Wilfley, after reviewing the treaties, statutes, and orders relating to the jurisdiction of England and the United States in China, concludes that

'while the Emperor of China exercises nominal sovereignty over all Chinese territory, including that occupied by the nationals of the United States and Great Britain, yet the jurisdiction of these two countries over their own citizens who reside in China is, for all practical purposes, as full and complete as if China were in fact territory belonging to these nations.'

He quotes with approval the doctrines laid down by Sir Francis Piggott in his work on 'Exterritoriality,' and by Mr. Hall in his 'Foreign Jurisdiction of the British Crown.' Commenting on the case of *Tootal's Trusts*, he says:

'We can see no good reason for holding that a citizen of the United States cannot be domiciled in China [3]. Mr. Justice Chitty's decision destroys in their application to China all the definitions of domicile contained in the books. It ignores both of the essential elements of residence and intention. The British Courts were correct when they stated that there was no authority for holding that an individual could (not [4]) become domiciled as a member of a community which was not a community possessing the supreme or sovereign territorial power. This fact is without significance when it is noted that the Courts were considering the first case of this character which had ever been presented for judicial determination. At the time the *Tootal's Trusts* case came up for consideration the British law of extraterritoriality was not so well developed as it is now, and the subsequent trend of events has given it a different

[1] In the body of the report the word 'China' is used. The syllabus substitutes the word 'Shanghai.'

[2] In the absence of proof the foreign law might have been presumed to be the same as that of the forum. Cp. Minor, Conflict of Laws, § 214, and cases cited.

[3] Mr. Justice Chitty did not deny that an Englishman could obtain a *Chinese* domicile.

[4] An obvious error.

meaning from what it had at the time the decision was rendered. It was quite natural for the Courts thirty years ago to announce that the immiscible character of the two races, and the radical difference between the religions, customs, habits, and laws of peoples of the two countries raised a strong presumption against a British subject becoming domiciled in China. At that time it was doubtless the fixed purpose of the majority of those who came to China to sojourn here only a few years, and then to return to the country from which they came. This is not the case at present. . . . It requires a greater stretch of the imagination, and the adoption of a greater fiction of law, to hold that a person can be domiciled in a country where he does not reside and has no intention of residing at any future time, than to hold that a citizen of a foreign state can acquire an extraterritorial domicile in a community which is not the community possessing the territorial power. . . . We hold, therefore, . . . that Dr. Young J. Allen . . . acquired an extraterritorial domicile in China; consequently this Court in the administration of his estate will be guided by the law which Congress has extended to Americans in China, which is the common law.'

The result of the case is correct. But the reasons supporting it are not very clearly stated; there is a tendency to confuse the question as to the amount of evidence necessary to overcome the presumption against the acquisition of a domicile in China with the question of the legal possibility of acquiring such a domicile under any circumstances. The choice of the words 'extraterritorial domicile' is unfortunate in that it is likely to convey the idea of exemption from the laws of the territorial sovereign.

Most of the writers of textbooks on private international law confine themselves to a statement of the doctrine announced in the case of *Tootal's Trusts*. Mr. Hall[1] says that the doctrine of Anglo-Oriental domicile has its reasonable place in English law, and suggests its adoption by an Order in Council. Mr. Westlake was the first to examine the question critically, and to present in a clear and adequate manner the principles of law involved[2]. Sir Francis Piggott[3] believes that the doctrine laid down by the English Courts demands reconsideration. He makes an accurate statement of the principles underlying the question when he says that 'the law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land.'

To sum up. The acquisition of a domicile in a country granting

[1] Foreign Jurisdiction of the British Crown, pp. 184–6.
[2] 'Domicile at a Chinese Treaty Port,' in 9 Law Magazine and Review (4th ser.), pp. 363–82. See also his Private International Law (4th ed.), pp. 311–22.
[3] Exterritoriality, pp. 228 et seq.

exterritorial privileges is governed by the same principles of law as the acquisition of a domicile in other countries. Where the requisite *factum* and *animus* are shown to exist there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China. In respect of all matters which private international law refers to the law of the domicile he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none the less the law of China because it provides that persons of British and American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China. The legislative power of China extends to all persons and things within the territorial limits of the Empire; the British Parliament in legislating for British nationals in China acts merely under a delegation of authority. Such laws are operative within the territory of China only because China recognizes them as part of the law of the land. The Chinese law subjects certain persons owing allegiance to a foreign government to rules of law which may differ from those that are applied to persons of Chinese nationality, just as the common law subjects certain transactions having their origin in foreign countries to rules of law which may differ from those that are applied to transactions taking place in the forum. Nor is the principle affected by the circumstance that this law is administered by officials appointed by a foreign government.

It follows from these principles that if the so-called exterritorial privileges are withdrawn by the territorial sovereign, even in violation of treaties, the domicile acquired in such country would continue, the persons remaining subject to such rules of law as the state of their domicile makes applicable to them. It follows further that a change in the nationality of a person domiciled in a country granting exterritorial privileges may involve a considerable change in the applicatory law governing matters subject to the law of domicile.

This view, it is submitted, preserves intact the theory that domicile is a legal relation between an individual and a particular country, and involves a certain submission to the laws of such country as the laws of the territorial sovereign. It upholds the doctrine that each state is supreme over all persons and things within the territorial boundaries. It does away with an anomaly in the law of domicile, and enables the courts to recognize the legal existence of a domicile where the facts and intent ordinarily requisite are present.

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HISTORY OF CONTRABAND OF WAR. II.

VI. *Lord Stowell's Decisions.*

THE great war began as far as England was concerned in 1793. It was more prolific than all its predecessors in raising questions of International Law, and it found in this country a man able and willing to seize to their fullest extent the opportunities granted to him. Sir William Scott—afterwards Lord Stowell—was appointed to preside at the Cockpit towards the end of the year 1798, and in the space of the next half-dozen years or so made the most characteristic and the most enduring contribution to the science of the law of nations that any Englishman has ever accomplished. As we have already seen, the writings of statesmen and a few judicial decisions had laid down the leading principles upon which Great Britain acted with regard to contraband of war and kindred subjects. But to the English mind the subject-matter of no papers of state, however important, and the opinions of no jurist, however eminent, could ever be elevated to the dignity of legal rules unless they had been adopted by the courts in the form of judicial decisions. There were existing a certain number of cases, but except in rare instances they gave no reasons. Lord Stowell brought to the task before him exceptional qualifications in an extensive knowledge of the writings of European publicists, and an intimate acquaintance with commercial affairs. Added to these were a power of exposition, clear, dignified, and definite, a thorough grasp of the principles underlying the rules of International Law, and a complete realization of the magnificent opportunity afforded to him.

VII. *The Catalogue of Contraband.*

It will be convenient, in the first place, to consider the catalogue of contraband articles so far as they have been the subjects of judicial decision, and afterwards to consider certain of the more important principles laid down in Lord Stowell's decisions.

The following table presents a view of the cases on contraband from this point of view. It is perhaps needless to observe that such things as arms and munitions of war are not included in the list for the simple reason that their contraband character has never been in doubt.

A. Articles held to be Absolute Contraband.

Pitch and Tar.—The *Med Guds Hielpe*, 1745, 1 R. P. C. 1.

The *Sarah Christina*, 1799, 1 R. P. C. 125.

The *Maria* (No. 1), 1799, 1 R. P. C. 152. 'Tar, pitch, and hemp destined for a hostile port are contraband, unless they are the produce of the shipper's own country, but in such case they are subject to pre-emption.'

The *Twee Juffrouwen*, 1802, 1 R. P. C. 384. 'I take it to be the established doctrine of this Court that pitch and tar are universally contraband unless protected by treaty, or unless it is shown that they are the produce of the country from which they are exported, in which latter case they are considered on the more modern and lenient application of the rule as subject to pre-emption only.'

Saltpetre.—The *Jesus*, 1756, 1 R. P. C. 6.

Masts.—The *Staadt Embden*, 1798, 1 R. P. C. 37. Non-contraband goods part of the same cargo *and the property of the same owner*, were also condemned.

The *Charlotte* (No 2), 1804, 1 R. P. C. 490.

Hemp.—The *Maria* (No. 1), supra.

The *Ringende Jacob*, 1798, 1 R. P. C. 60. This was decided under the Danish treaty of 1780, but the judgment declares hemp to be contraband apart from treaty.

The *Apollo* (No. 1), 1802, 1 R. P. C. 368. 'Hemp is certainly liable to be considered as generally contraband.' In this particular case the cargo was restored as the produce of a neutral country which had exported it, although on board the ship of another neutral country.

Sail-cloth.—The *Neptunus* (No. 3), 1800, 1 R. P. C. 264. 'That is universally contraband, even on a destination to ports of mere mercantile naval equipment.'

B. Articles held to be Conditional Contraband.

Salt.—The *Jonge Tobias*, 1747, 1 R. P. C. 3.

Butter, Tallow.—The *Young Andreas*, 1747, 1 R. P. C. 3.

The *Neptunus* (No. 3), 1800, 1 R. P. C. 264.

Masts.—The *Vryheid* (No. 1), 1778, 1, R. P. C. 13. 'A Dutch ship bound for Rochfort with a cargo of masts for the French Government was captured. The Court ordered the cargo to be sold for the use of His Majesty, all freight expenses and charges to be paid by His Majesty.'

This case appears to be in conflict with the *Staadt Embden* and the *Charlotte* (No. 2). The decision was influenced to a certain extent by the Anglo-Dutch treaty of 1674.

Cheeses.—The *Jonge Margaretha*, 1799, 1 R. P. C. 100. The leading cases on conditional contraband.
The *Zelden Rust*, 1805, 1 R. P. C. 532.
Wines.—The *Edward*, 1801, 1 R. P. C. 350.
Resin.—The *Nostra Signora de Begona*, 1804, 1 R. P. C. 433.
Brimstone.—The *Carpenter*, 1810, 1 R. P. C. 433 n.

C. Articles held to be Non-Contraband.

Coals.—The *Young Andreas*, 1747, 1 R. P. C. 3.
Oil, Lemons.—The *St. Jacob*, 1759, 1 R. P. C. 6.

VIII. *Food-Stuffs.*

The Great War opened with an altogether unjustifiable attempt on the part of Great Britain to classify as contraband all food-stuffs going into France at all, quite irrespective of the question whether they were intended for any military purpose or were attempting to enter a blockaded port. The Orders in Council of June 8, 1793, instructed British cruisers on this point:

'To detain all vessels laden with corn, flour, or meal, bound to any port in France, or any port occupied by the armies of France, and to send them into a British port in order to subject the cargoes to the right of pre-emption.'

It was argued in support of these instructions that the extraordinary character of the war authorized a deviation from the ordinary maxims of international law, that it was universally recognized that provisions might become contraband when there were hopes of reducing the enemy by famine, that they might still more justly be so regarded when the distress of the enemy was occasioned by the unprecedented measures (i. e. the *levée en masse*) he had adopted to carry on a war, of a character equally unprecedented and which menaced the safety of the whole civilized world[1]. The instructions may be explained but hardly justified by the state of public opinion at the time, by the reports of the famished condition of the Parisian populace (so vividly described by Carlyle), by the natural repugnance of order-loving Britons to the excesses of the Terror, by the feelings of horror generated by the execution of the French king, and by the burning desire to check the spread of revolutionary principles immediately and decisively.

The neutral nations, Denmark, Sweden, and the United States, whose trade was grievously affected by the Orders in Council,

[1] Wheaton, op. cit., p. 375.

brought a battery of unanswerable arguments to bear upon them. 'It would follow that a belligerent might at any time prevent, without a siege or blockade, all trade whatsoever with its enemy; since there is at all times reason to believe that a nation, having little or no shipping of its own, might be so materially distressed by preventing all other nations from trading with it that such prevention might be a powerful instrument in bringing it to terms. The principle is so wide in its nature that it is, in this respect, incapable of any boundary. There is no solid distinction, in this view of the principle, between provisions and a thousand other articles. Men must be clothed as well as fed; and even the privation of the conveniences of life is severely felt by those to whom habit has rendered them necessary. A nation in proportion as it can be debarred its accustomed commercial intercourse with other states must be enfeebled and impoverished; and if it is allowable to a belligerent to violate the freedom of neutral commerce in respect of any one article not contraband *in se*, upon the expectation of annoying the enemy, or bringing him to terms by a seizure of that article, and preventing its reaching his ports, why not, upon the same expectation of annoyance, cut off, as far as possible, by captures all communication with the enemy, and thus strike at once effectually at his power and resources[1]?'

The British Government ultimately gave way, the Orders were revoked, and a commission awarded full compensation to the owners of vessels and cargoes seized under them.

It is pleasing to turn from this to the leading case—the *Jonge Margaretha*, 1 R. P. C. 100—in which Lord Stowell dealt with the vexed question of the contraband character of food-stuffs and incidentally with the general principles of conditional contraband. The question of fact was of the simplest character—'Is this a legal transaction in a neutral, being the transaction of a Papenberg ship carrying Dutch cheeses from Amsterdam to Brest or Morlaix (it is said), but certainly to Brest?' The judgment then considers the condition of Brest and points out 'what was notorious to all Europe at this time, that there was in that port a considerable French fleet in a state of preparation for sallying forth on a hostile expedition, its motions at that time watched with great anxiety by a British fleet which lay off the harbour for the purpose of defeating its designs. Is the carriage of such a supply, to such a place, and on such an occasion, a traffic so purely neutral as to subject the neutral trader to no inconvenience?'

Then Lord Stowell deals with the contraband character of food-stuffs. 'If it could be laid down as a general position in the manner

[1] Wheaton, op. cit., pp. 383-4.

in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered; but the Court lays down no such position.' Several English precedents and the views of Wolf and Vattel are considered, and the conclusion is reached: 'I take the modern established rule to be this—that generally (provisions) are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it.'

In the case of food-stuffs and of all articles *ancipitis usus* there are three sets of extenuating circumstances which may suffice to exclude them from the category of contraband altogether. These are:

1. When they are the product of the country which exports them.

2. When the articles are in their native and unmanufactured state.

3. When the articles are intended for the ordinary use of life, or even for the use of mercantile ships, as contrasted with a destination to military use.

Of these the last is the most important. 'Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usus*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful [1].'

There is small wonder that this decision is the leading case on the subject. There really appears to be little more to be said, and from that time to the recent Russo-Japanese war every fallacy that has arisen upon this point can be disposed of by the principles laid down in this famous judgment. When Russia issued a declaration including food in the category of absolute contraband, Lord

[1] 1 R. P. C. 103.

Lansdowne and Mr. Balfour adopted the reasoning of Lord Stowell without qualification[1].

IX. *The Right of Search.*

Of all the cases that came before Lord Stowell the most important from the point of view of the judgment itself, of the controversies to which it gave rise, and of the results that followed it, was the case of the Swedish convoy. The *Maria* (No. 1), 1 R. P. C. 152; 1 C. Rob. 340. Denmark was the only one of the northern powers that had consistently abided by the principles of the first Armed Neutrality, but to these principles a new one was now added in the shape of an old pretension—once or twice advocated by those powers and the Dutch, but always repudiated by the strong maritime states, viz. that the declaration of the officer commanding a ship of war having merchant vessels under convoy should be accepted as conclusive evidence of the character of those cargoes, and should abrogate the right of search. The convoys of the neutral states were increased, the officers were given instructions to resist the searching of their convoys, and so the matter at once came to a head. In January, 1798, a fleet of Swedish merchantmen sailing under convoy of a frigate was stopped by a small squadron under Commodore Lawford in the Channel. The frigate made a show of resistance, but the British obtained possession of the greater part of the fleet during the night, and ultimately the frigate yielded to superior force without fighting an action. The merchantmen with their cargoes of tar, pitch, hemp, deals, and iron were brought in for adjudication, the case was argued at much length in December, 1798, adjourned for further information, re-argued, and judgment given on June 11, 1799.

Lord Stowell, after referring to the importance of the case, uttered some memorable words as to the principles upon which the judge of a Prize Court ought to act:

'In forming that judgment, I trust that it has not escaped my anxious recollection for one moment what it is that the duty of my station calls for from me—namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations, but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly

[1] Smith and Sibley's International Law as interpreted during the Russo-Japanese War, p. 226.

as he would determine the same question if sitting at Stockholm; to assert no pretensions on the part of Great Britain which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character. If, therefore, I mistake the law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question—a question regarding one of the most important rights of belligerent nations relatively to neutrals [1].'

Then, after a statement of the facts, he proceeds to state a few principles of the law of nations which he takes to be incontrovertible:—

'First, that the right of visiting and searching merchant ships upon the high seas, whatever be the ships, whatever be the cargoes, whatever be the destinations, is an incontestable right of the lawfully commissioned cruisers of a belligerent nation. I say, be the ships, the cargoes, and the destinations what they may because, till they are visited and searched, it does not appear what the ships, or the cargoes, or the destinations are; and it is for the purpose of ascertaining these points that the necessity of this right of visitation and search exists. This right is so clear in principle that no man can deny it who admits the legality of maritime capture; because if you are not at liberty to ascertain by sufficient inquiry whether there is property that can legally be captured it is impossible to capture. Even those who contend for the inadmissible rule, that *free ships make free goods*, must admit the exercise of this right at least for the purpose of ascertaining whether the ships are free ships or not. The right is equally clear in practice, for practice is uniform and universal upon the subject. The many European treaties which refer to this right refer to it as pre-existing, and merely regulate the exercise of it. All writers upon the law of nations unanimously acknowledge it, without the exception even of Hubner himself, the great champion of neutral privileges. In short, no man in the least degree conversant in subjects of this kind has ever, that I know of, breathed a doubt upon it. The right must unquestionably be exercised with as little of personal harshness and vexation in the mode as possible; but soften it as much as you can, it is still a right of force, though of lawful force—something in the nature of civil process where force is employed, but a lawful force which cannot lawfully be resisted. For it is a wild conceit that wherever force is used it may be forcibly resisted; a lawful force cannot lawfully be resisted. The only case where it can be so in matters of this nature is in the state of war and conflict between two countries, where one party has a perfect right to attack by force and the other has an equally perfect right to repel by force. But in the relative situation of two countries at peace with each other no such conflicting rights can possibly coexist.

'Secondly, that the authority of the sovereign of the neutral

[1] 1 R. P. C. 153.

country being interposed in any manner of mere force cannot legally vary the rights of a lawfully commissioned belligerent cruiser.

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'The only security known to the laws of nations upon this subject, independent of all special covenant, is the right of personal visitation and search, to be exercised by those who have the interest in making it.'

It was true that 'modern fancy, under the various denominations of philosophy and philanthropy,' had thrown certain 'loose doctrines' upon the world, viz. that the certificate of the convoying officer ought to be accepted as conclusive evidence of the character of the convoyed cargoes. The system of which such doctrines are elements must, to be consistent, advocate

'the entire abolition of capture in war, that is, in other words, to change the nature of hostility as it has ever existed amongst mankind, and to introduce a state of things not yet seen in the world, that of a military war and a commercial peace. If it were fit that such a state should be introduced, it is at least necessary that it should be introduced in an avowed and intelligible manner.'

'Thirdly, that the penalty for the violent contravention of this right is the confiscation of the property so withheld from visitation and search.' After an examination of authorities, the judge concludes on this head:

'But I stand with confidence upon all fair principles of reason—upon the distinct authority of Vattel; upon the institutes of other great maritime countries, as well as those of our own country—when I venture to lay it down, that by the law of nations, as now understood, a deliberate and continued resistance to search on the part of a neutral vessel to a lawful cruiser is followed by the legal consequence of confiscation.'

It will not be necessary for our present purpose to follow the judgment into an examination of the special circumstances that were alleged to have affected the application of the general principles, except to remark upon that part of it which declares that tar, pitch, and hemp going to the enemy's use were contraband in their own nature under the modern law of nations, though formerly, when the hostilities of Europe were less naval, they were of a disputable nature. Comment is also made upon the change that had taken place since the case of the *Med Guds Hielpe* in the penalty awarded for carrying conditional contraband when the illicit articles were the produce of the exporting country, and the property of merchants of that country. The former penalty was confiscation, now it was 'the milder rights of preoccupancy and pre-emption.'

The conclusion of the whole judgment is also worth quoting as

an example of what has been called 'Lord Stowell's best eighteenth-century manner':

'This is the substance of what I have to pronounce judicially on this case, after weighing with the most anxious care the several facts and the learned arguments which have been applied to them. I deliver it to my country, and to foreign countries, with little diffidence in the rectitude of the judgment itself. I have still more satisfaction in feeling an entire confidence in the rectitude of the considerations under which it has been formed.'

The Scandinavian powers were infuriated by this decision. Denmark's able statesman, Count Bernstorff, in a note to the British minister, contended that the rights of visitation and search were confined to neutral ships not under convoy; that the right was a conventional as opposed to a natural one, and could not therefore be exercised further than the neutral power had consented by treaty to its exercise; that the neutral power by placing its ships under convoy gives the security of the government itself that the neutral character had not been fraudulently assumed. 'The contrary principle would involve the absurd consequence that the most formidable fleet with a convoy under its protection would be subject to search by the most insignificant privateer.'

The most elaborate reply to the judgment of Lord Stowell was the 'impartial examination' of J. F. W. Schlegel, Professor of Law at the University of Copenhagen, entitled 'Upon the Visitation of Neutral Vessels under Convoy.' This pamphlet is a fine example of the art of special pleading. Like the theologians, the author unblushingly assumes what he wants to prove, and manifests a sublime disregard for any facts that may tell against his own view. Like Count Bernstorff, Schlegel begins his argument by assuming that the principle of free ships, free goods, or that the neutral flag covers the cargo was one universally admitted and of general application. A long disquisition upon the origin and legality of privateering, which appears to be in no way relevant to the matter in hand, is introduced; and it is then argued that the right of search is one entirely founded upon treaty, whereas the very treaties that limit the right are the best evidence of its general existence. There is no necessity to make a treaty to limit a right if that right has no existence apart from the treaty. This is one great point of controversy between the respective advocates of belligerent and neutral rights, but the reasoning of the neutral advocates is, to say the least of it, very difficult to follow. In the succeeding discussion upon the non-existence of a right of search against a convoyed fleet, the writer admits that he can find one direct authority only in its favour—the Code of Christian V of

Denmark promulgated in 1688. He examines a number of treaties relating to the right of search, and assumes that because they make no reference at all to convoys they therefore imply that the right of search should not apply to vessels under convoy. When a writer is reduced to using such an argument as that it is difficult to treat him seriously.

Numerous pamphlets were written in reply to Schlegel, but it is unnecessary to refer to them. His work is only interesting as a specimen of the views entertained by the neutral powers, and of the reasons by which they were supported.

X. *The Second Armed Neutrality.*

The question raised in the case of the *Maria* was not allowed to remain one to be bandied about by jurists in a war of pamphlets. In December, 1799, off Gibraltar, British boats endeavouring to effect a search were fired on by a Danish convoying frigate, and in July, 1800, a Danish frigate, the *Freya*, in attempting to defend her convoy, was captured in the Channel by a British squadron. Immediate satisfaction was demanded on both sides; Lord Whitworth was dispatched on a special mission to Copenhagen in order to give greater weight to the representations of the British Government, and a British fleet was sent to the Sound—as Wheaton remarks, 'in order to give greater weight to the representations' of Lord Whitworth. Neither side would give way in the controversy; but neither side was anxious for war, and a convention was arranged on August 29, 1800, whereby the *Freya* and her convoy were restored, and Denmark agreed to suspend the granting of convoy, the question of right being reserved for ulterior discussion.

The matter, however, did not end here. Paul of Russia, on hearing of the *Freya* incident, had issued a declaration inviting the northern powers to revive the principles of the Armed Neutrality. The conclusion of the Anglo-Danish convention put an end to the plan for the moment, but the English capture of Malta, and the refusal of the government to deliver it to the Knights of St. John and to the Tsar as the Grand Master of the Order, roused Paul to fury. The arrival of Gustavus of Sweden in St. Petersburg on November 29 quickened the course of the negotiations, and on December 16–18, 1800, a series of treaties between Russia, Sweden, Denmark, and Prussia formed the Second Armed Neutrality. The chief articles agreed upon were:

1. That every vessel may navigate freely, from port to port, and on the coasts of nations at war.

2. That the goods belonging to the subjects of the powers at war shall be free in neutral vessels, except contraband articles.

3. That to determine what is meant by a blockaded port, this denomination is only to be given to that where there is a sufficient naval force of the blockading power stationed so near as to make the attempt to enter it evidently dangerous; and that any vessel, sailing towards a blockaded port, should not be considered as contravening the convention, unless, after having been notified by the commander of the blockading force of the existence of the blockade, she should still endeavour to enter the blockaded port by means of force or fraud.

4. That neutral vessels shall only be detained for just cause and evident facts, that they shall be adjudged without delay, that the procedure shall always be uniform, prompt, and legal; and that in every case, besides the damages awarded to the injured parties, complete satisfaction shall be given for the insult to the national flag.

5. That the declaration of the officers commanding the public ships which shall accompany the convoy of one or more merchant vessels, that the ships of his convoy have no contraband articles on board, shall be deemed sufficient to prevent any search on board the convoying vessels or those under convoy.

These principles extended those of 1780 in three particulars: (1) The article as to convoy, (2) the more stringent definition of a valid blockade, and (3) the provision as to a formal apology to the neutral flag [1].

The treaties were followed by peace and friendly negotiations between Paul and Napoleon, coupled with a series of elaborate plans for the subversion of British power. For this purpose the two great powers used the Northern League as a convenient catspaw. Danish explanations to British representations were unsatisfactory, an embargo was placed on all Russian, Danish, and Swedish vessels in British ports, the rivers of Germany and the North were closed to British trade, and ultimately, on April 2, 1801, Nelson and Parker destroyed the Danish fleet at Copenhagen. Already, on March 23, Paul had been strangled by a court faction driven to desperation by his madness, and Alexander ascended the throne of Russia. The sequel cannot better be given than in the words of the only modern English writer who has dealt adequately with the History of International Law:

'The Second Armed Neutrality had received its deathblow. The spirit of the North was not crushed by the battle of Copenhagen;

[1] Cambridge Modern History, vol. ix, 'Napoleon,' p. 47.

Sweden maintained a bold front; and Bonaparte filled the air with indignant, encouraging cries. But no glamour of Maltese dreams blinded the eyes of Alexander. He made known forthwith his willingness to negotiate with England. Duroc, dispatched to St. Petersburg on April 26, had soon to report that France had nothing to hope or to fear from Alexander. Under a maritime convention negotiated by Lord St. Helens with Panim, and signed on June 19, 1801, amicable relations were restored between Russia and Great Britain. The latter accepted verbally certain of the principles of the Armed Neutrality; namely, that neutral vessels might navigate freely to the ports and on the coasts of nations at war; that such vessels should only be stopped for just cause and in respect of evident fact; that they should be adjudicated upon without delay; and that the procedure followed should always be uniform, prompt, and legal. She agreed that the right to visit merchantmen under neutral convoy should not be exercised by a privateer. But she obtained the recognition of the general right of her belligerent vessels of war to visit and search neutral convoys, of her belligerent right to capture hostile property under the neutral flag on the high seas, and of the validity of a blockade maintained by cruising ships. The convention was drafted in terms which were calculated to satisfy the *amour-propre* of Alexander; but the substantial fruits of victory in the maritime discussion were practically left in the hands of England. Already an end had been put to the war of embargoes between Great Britain and the Baltic Powers; and Alexander had meditated the withdrawal of the Danish forces from Hamburg (May 23). The retirement of the Prussians from Hanover and Bremen was delayed some time longer; the Swedes and the Danes for some months stood out for better terms; but on October 23, 1801, Copenhagen unwillingly adopted the convention of St. Petersburg; and on March 30, 1802, Gustavus Adolphus IV sullenly handed in his adhesion[1].'

[1] Cambridge Modern History, vol. ix, p. 50.

Wheaton, History, p. 401 et seq., gives a more detailed account of the provisions of the Treaty of St. Petersburg. For those who wish to follow the controversy in greater detail the following are some of the chief pamphlets published in England on the question:

Remarks on Mr. Schlegel's work upon the Visitation of Neutral Vessels under Convoy. By Alexander Croke, Esq., LL.D., Advocate in Doctors Commons. London, 1801.

A Treatise of the relative Rights and Duties of Belligerent and Neutral Powers in Maritime Affairs: in which the Principles of Armed Neutralities and the Opinions of Hubner and Schlegel are fully discussed. By Robert Ward, Esq., Barrister-at-Law. London, 1801.

Letters of Sulpicius on the Northern Confederacy. London, 1801.

A Vindication of the Convention lately concluded between Great Britain and Russia. In Six Letters. London, 1801.

Substance of the Speech delivered by Lord Grenville in the House of Lords, November 13, 1801, on a motion for an address approving of the Convention with Russia. London, 1802.

War in Disguise; or the Frauds of the Neutral Flags. By J. Stephen. London, 1805.

XI. *The Doctrine of Continuous Voyages.*

The doctrine of continuous voyages was an invention of Lord Stowell. Historically it arose out of the Rule of the War of 1756; but though the changed conditions of modern times have virtually abrogated that rule, they have in no way diminished the importance of the question of continuity of voyage. The Rule of the War of 1756 was a corollary to the old mercantile system. Under that system the colonies of a European power were considered to exist for the exclusive benefit of the power to which they belonged. Consequently the whole of their trade had to be carried on in ships flying the flag of the mother country. In the wars of the latter part of the eighteenth century, however, the naval preponderance of Great Britain was such that the other maritime belligerents were unable to safeguard their colonial trade, and eagerly seized the opportunity of allowing neutral powers to carry on this trade in time of war, though they were not permitted to exercise it in time of peace. Great Britain refused to recognize this practice, and her Prize Courts condemned such voyages as virtually though not nominally belligerent. The objects of the neutral nations were to evade the operation of the British rule, and at the same time to retain the profits of the trade; and their favourite device for this purpose was to ship the goods in the first instance to a port in the neutral country, and afterwards to forward them to their real destination in the belligerent country. It is obvious that such a scheme must have given rise to questions of great nicety as to the real destination of the cargo. Was the cargo really imported into the neutral country, or was the importation merely colourable? In other words, was the voyage really a continuous one from the colonial port to the port in the mother country, or could it be properly divided into two separate transactions—a voyage from the colonial to the neutral port, and another voyage from the neutral port to the mother country? The question is obviously one of fact to be determined in each particular case, but the grounds upon which the decision must be come to have never been better expressed than by Sir William Grant in the case of the *William* (No. 2), 1 R. P. C. at p. 507:

'What, then, with reference to this subject, is to be considered as a direct voyage from one place to another? Nobody has ever supposed that a mere deviation from the straightest and shortest course in which the voyage could be performed would change its denomination and make it cease to be a direct one within the intendment of the instructions. Nothing can depend on the degree or the direction of the deviation, whether it be of more or fewer leagues, whether

towards the coast of Africa or towards that of America. Neither will it be contended that the point from which the commencement of a voyage is to be reckoned changes as often as the ship stops in the course of it; nor will it the more change because a party may choose arbitrarily by the ship's papers, or otherwise, to give the name of a distinct voyage to each stage of a ship's progress. The act of shifting the cargo from the ship to the shore, and from the shore back again into the ship, does not necessarily amount to the termination of one voyage and the commencement of another. It may be wholly unconnected with any purpose of importation into the place where it is done. Supposing the landing to be merely for the purpose of airing or drying the goods, or of repairing the ship, would any man think of describing the voyage as beginning at the place where it happened to become necessary to go through such a process? Again, let it be supposed that the party has a motive for desiring to make the voyage appear to begin at some other place than that of the original lading, and that he therefore lands the cargo purely and solely for the purpose of enabling himself to affirm that it was at such other place that the goods were taken on board, would this contrivance at all alter the truth of the facts? Would not the real voyage still be from the place of the original shipment, notwithstanding the attempt to give it the appearance of having begun from a different place? The truth may not always be discernible, but when it is discovered, it is according to the truth and not according to the fiction that we are to give to the transaction its character and denomination. If the voyage from the place of lading be not really ended, it matters not by what acts the party may have evinced his desire of making it appear to have ended. That those acts have been attended with trouble and expense cannot alter their quality or their effect. The trouble and the expense may weigh as circumstances of evidence to show the purpose for which the acts were done; but if the evasive purpose be admitted or proved, we can never be bound to accept as a substitute for the observance of the law, the means, however operose, which have been employed to cover a breach of it. Between the actual importation by which a voyage is really ended and the colourable importation which is to give it the appearance of being ended, there must necessarily be a great resemblance. The acts to be done must be almost entirely the same, but there is this difference between them: the landing of the cargo, the entry at the custom-house, and the payment of such duties as the law of the place requires, are necessary ingredients in a genuine importation; the true purpose of the owner cannot be effected without them. But in a fictitious importation they are mere voluntary ceremonies, which have no natural connexion whatever with the purpose of sending on the cargo to another market, and which, therefore, would never be resorted to by a person entertaining that purpose, except with a view of giving to the voyage which he has resolved to continue the appearance of being broken by an importation which he has resolved not really to make.'

With reference to this doctrine there is one further point that merits brief consideration, viz. whether it applies at all to cases of contraband of war. Sir W. Harcourt has laid down that—

'in order to constitute contraband of war it is absolutely necessary that two elements should concur, namely, a hostile quality and a hostile destination. If either of these elements is wanting, there can be no such thing as contraband. Innocent goods going to a belligerent port are not contraband. Here there is a hostile destination, but no hostile quality. Hostile goods, such as munitions of war, going to a neutral port, are not contraband. Here there is a hostile quality, but no hostile destination[1].'

Hall and the last editors of Wheaton appear to think that the application of the continuous voyage doctrine to contraband cases was a violation, or at best an extension, of Lord Stowell's principles. The reply to this is that Sir W. Grant in the case of the *William* (No. 2) expressly referred to an instance (the case of the *Eagle* in 1803) in which the doctrine had been so applied.

We venture also to controvert the statement in Messrs. Smith and Sibley's recent book (at p. 236), that 'it may of course be properly pointed out that the application of the doctrine of continuous voyages to the conveyance of contraband is hardly consistent with one of the best-known of Lord Stowell's judgments, the *Imina*[2]. What Lord Stowell said in the *Imina* was this (1 R. P. C. at p. 290):

'The rule respecting contraband, as I have always undertood it, is that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations, you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offence is complete, and it is not necessary to wait till the goods are actually endeavouring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.'

The *Imina* was a case of contraband, and we fail altogether to see that either the words of Lord Stowell, or the criterion laid down by Historicus, are inconsistent with the doctrine of continuous voyage. The essence of that doctrine is that the destination of the goods is their ultimate destination, and that once that has been determined it cannot be altered by forging a number of additional links to the chain in the shape of intermediate destinations. To constitute contraband there must be the hostile quality and the

[1] Letters of Historicus, p. 191.

[2] It is true that the learned authors proceed to add, 'But the case of the *Eagle* can be reconciled with even this last case, if it is treated as a case of a vessel with a false destination.' We need only remark that *every* case of continuous voyage must be 'treated as a case of a vessel with a false destination.'

hostile destination, meaning by the term 'destination' a real and not a fictitious one.

The extensions of the doctrine of continuous voyage by the American Courts during the Civil War, and the interesting controversies to which they gave rise, fall outside the limits of our period.

XII. *Conclusion.*

To summarize the Law of Contraband as it was left by Lord Stowell would be in great measure to state the law as it now exists. Such a statement appears to be out of place in a purely historical paper, and will not therefore be attempted here.

The Thirty Years' Peace could, *ex rei natura*, produce no cases on the Law of Prize, and in fact no cases are reported in Mr. Roscoe's volumes between the *Felicity*, decided by Lord Stowell in 1819, and the *Fenix*, otherwise *Phoenix*, decided by Dr. Lushington in 1854. Curiously enough the Crimean War did not give rise to a single case distinctly arising out of the rules of contraband, and to whatever other causes this might be due, there seems to be no doubt that one of the chief reasons was that the principles had been so well and truly laid by Lord Stowell that it was hopeless to attempt to re-argue them, or even to misconstrue them, in an English Court of Prize. We may well ask what greater tribute could be paid to the memory of a judge.

The Declaration of Paris in 1856 enacted:

Art. 2. The neutral flag covers enemy's goods, with the exception of contraband of war.

Art. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag.

The effect of this has been to leave the doctrine of contraband in theory exactly in its former place (for the Declaration contains no definition of contraband or of any other term), but in practice to enormously enhance its importance. Every power, when it has occupied the position of a belligerent, has attempted to fully exercise the recognized rights of belligerents, and the attempt to extend the list of contraband articles is the most obvious way of extending these rights. The illustrations of this afforded by the American Civil War, and the Russo-Japanese War, and the recent British attempt at the Hague Conference to abolish contraband of war entirely, do not fall within the period that we have been considering.

H. J. RANDALL.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The Constitutional History of England: a course of lectures delivered by F. W. MAITLAND. Cambridge: University Press. 1908. [Preface by H. A. L. FISHER.] 8vo. xxviii and 547 pp.

THESE lectures, intended for beginners in English law, were completed twenty years ago, just before Maitland was elected to the Downing Professorship at Cambridge, and delivered by him as Reader in the winter terms of 1887–8. They were written in six months, and Maitland was too much occupied with the original work leading up to his later and riper publications to think of revising and publishing them. Are they, then, at this day, merely a personal document, like so many other posthumous works of eminent scholars, interesting for minute students of intellectual development, but superseded for general use? Do they mark—as most lectures of that date would—a stage which we have now left behind? Nothing of the sort. Mr. Fisher says in his preface:—'There is no book, to my knowledge, which provides so good an introduction to the study of English Constitutional History, or which is likely to be more highly valued by practical teachers of the subject at our Universities.' And he is perfectly right. Nothing has happened to prevent these lectures, with the aid of the short supplementary notes and references judiciously supplied by Mr. Fisher, from being as useful in 1908 as they were in 1888. Many contributions have been made to our detailed knowledge of this and that episode in the growth of the English constitution; Maitland's own were among the best. But the main lines are unchanged, and the broad exposition of a scholar like Maitland remains as good as ever. It is true that the modern law and custom of the constitution do not stand still; they are growing under our eyes; we cannot now see the government of England with Bagehot's eyes, not to speak of Hallam's or Blackstone's. But Maitland had the foresight of genius, and we find his ideas abreast with those of the ablest and best informed living students; Mr. Lawrence Lowell, for example, whose work is noticed elsewhere in these pages. Take his dissection of the powers ascribed to 'the Crown'; it is as fresh to-day as twenty years ago, perhaps even more necessary, for there has been wild talk of 'the Crown' in very high places. Observe, too, the passages where Maitland expressed his doubts of this or that opinion still plausible in 1887. Few of those doubts, if any, have failed to be established as positive denials by later research, Maitland's own or another's; thus he refused to accept the popular Whig view of the Star Chamber, and now Mr. Leadam's introduction to the volume edited by him for the Selden Society has finally made it untenable.

The frame of the book is original and felicitous. It is not a narrative,

but a series of views taken at fixed periods and presenting the body of English public law as it existed at each time. The first chosen date is that of Edward I's death (1307); we see the dangers of particularism and feudalism surmounted and the foundations of Parliament and the Common Law well and truly laid. Next we go to the death of Henry VII (1509); a long jump, as Maitland himself pointed out, but after all there is no definite halting-place between the Plantagenet system of undisguised personal rule, though a lawful rule, and the Tudor system of despotic administration through strictly legal forms. Thence we pass to the death of James I (1625), and find the estates of the realm taking their legal rights into their own hands; a number of open questions, most of them quite fairly open, await decision or compromise before it can be known just how far those rights go. No one can tell what might have happened if James I had taken Bacon's advice, or even if Henry Prince of Wales had lived to be a wiser king than Charles I. It is possible to hold that in 1625 it was already too late to avoid a conflict; but, as Charles I in fact rather forced than attempted to avoid it, his accession is as good a conventional date as any for the parting of the ways. Besides, it is much easier to laugh at regnal dates than to find a better working aid to historical memory. The next landmark is the death of William III (1702). Parliament has triumphed after the varied episodes of Civil War, Commonwealth, Restoration, and Revolution (a true supra-legal revolution in which the political facts cannot be put into a legal shape without fiction: so Maitland held, and in our opinion made it good). The king's servants are answerable not only to the courts, but to Parliament; but the party system is still unformed, and the king has a real discretion in their choice, and, if there is already something like a board of directors of the Commonwealth, he is still the active chairman of the board. Finally, we pass over nearly two centuries to 1887, when this course of lectures was opened. We should have liked an intermediate stage marking the latest time when the Blackstonian theory of the Constitution could be said to be approximately true; the choice would lie between 1820 and 1830. But those who know anything of University teaching will rather wonder how Maitland contrived to put so much as he did into one winter's course. He rightly judged it important that his hearers should have a pretty full view of the modern system of cabinet government, under which administration, and practically legislation, are directed by a select body of officers of State and other prominent members of both Houses, belonging to the party which commands a majority in the House of Commons. This is perhaps the most useful part of the book; there are other and more recent expositions of our unique party government which are quite sound, but none that is so well fitted to enlighten beginners. Mr. Lawrence Lowell's more detailed account will be in many of our learned readers' hands; they will find profit in comparing it with Maitland's lectures and noting the coincidences. Maitland's careful distinction between the various forms of executive authority at the disposal of the Ministry (many or most of which are now statutory, not remnants of the king's authority at common law) was, if we mistake not, quite new at the time. Once or twice he allowed himself the luxury of touching on a strictly academic question—such as whether the king can abdicate by a voluntary act, a question most unlikely to be resolved in our time. We can only regret that he did not live to discuss recent developments: in 1887 the Committee of Imperial Defence had not been devised, and there was little talk as yet of an 'inner Cabinet.'

In a future edition, which we confidently expect will be called for, we think Mr. Fisher's explanatory and supplementary notes might usefully be enlarged a little; not very much, for his brevity is, in the main, highly laudable. F. P.

English Society in the Eleventh Century: Essays in English Mediaeval History. By PAUL VINOGRADOFF, Corpus Professor of Jurisprudence in the University of Oxford. Oxford: at the Clarendon Press. 1908. 8vo. xii and 599 pp. (16*s.* net.)

WE had hardly expected another of Prof. Vinogradoff's illuminating treatises so close on the heels of 'The Growth of the Manor' (1905), and we are grateful accordingly. The author is here dealing with the same authorities as before—Domesday, and illustrative documents of earlier and later date—but they are approached from another side; in place of studying these records from the land side, we are now looking at them from the personal side. We still read of geld hides, carucates, and plough teams, of manors, berewicks and sokes, but it is in their relation to the person, whether in his individual or communistic capacity. A glance at the table of contents will make this clear. The work is divided into two 'essays':—(1) 'Government and Society,' and (2) 'Land and People,' each divided into three sections, and having a general survey at the end. The first of these consists of (1) Military Organization: Mercenaries and National Levies, Feudal Service; (2) Jurisdiction: The County and the Hundred, Franchises; (3) Taxation: The Geld, Fiscal Immunities. The second essay consists of (1) Land Tenure: The Legal Framework, Husbandry; (2) Rural Organization: Manors, The Demesne, The Land of the People; (3) Social Classes: Landowners and Free Tenants, Peasants. Thus we have the duties, rights and privileges of the individual in all his public and quasi-public functions, save in that of town life, which the author promises to treat of in a separate work. To quote the words of the preface, these essays are directed 'to the terminological and institutional side of the inquiry rather than to the statistical and topographical.'

The period dealt with, the eleventh century, is one of extraordinary importance to the student of English social history. Prof. Vinogradoff calls it 'the watershed in the development of English society.' The phrase is not very happy. We would rather refer to it as the union of three distinct streams, Teutonic, Scandinavian and French, which were thenceforth to run a common course, intermingled, but each nevertheless preserving some of its distinctive features. It is the presence of these three elements which makes the study of this epoch at once so complicated and so fascinating. The skilful subdivision of the problems here dealt with will be best illustrated by a quotation from the Introduction.

> 'I should like to analyse the principal legal institutions of the age in their bearings on the constitution of society. . . . I shall try, firstly, to examine the decisive political factors of social life and to trace the influence of public law on society; secondly, to examine the economic factors of social life and to trace the influence of husbandry and of private law in as far as it regulates husbandry; thirdly, to examine the classes and groups produced by the combined working of political and economic causes, and to trace the main features of the laws as to personal status under which these classes live. . . . We shall have

> to speak of institutions to some extent, but let us chiefly look at the work they were doing, at the social problems they had to solve. From this point of view a primitive government like that of England in the eleventh century has to face mainly three great questions, . . . the defence of the country, the maintenance of order and justice, and the providing of the means of existence for government by means of taxation.'

The section on military organization is excellent, and the intimate connexion of the fighting force with the system of hidation is particularly well brought out. Prof. Vinogradoff argues strongly for a normal knight's fee, notwithstanding the large amount of apparent variation which is found all over the country, and we find his arguments convincing. There is a capital suggestion as to the mysterious 'buscarls' at Malmesbury. These have been considered as sailors of some sort, from O.N. *buza* (buss) a boat, though on this interpretation it is difficult to see why the king should have 20*s.* *ad pascandos suos buzecarlos* from an inland town like Malmesbury. The author suggests a derivation from O.N. *boð*,—order, command; *bodscarls* would thus be men under command. But is it quite certain after all that the word is not a ghost-word, due to a clerical error or misreading of *b* for *h*? We find other inland boroughs paying various sums *ad opus huscarlium*; the survey, as we know it, is but a copy, and not a few clerical errors can be clearly traced in place names; *b* and *h* are very much alike in the MS.

The section on Feudal Service and the different kinds of military tenants, knights, sergeants, thanes, drengs, radknights, and *liberi homines*, will also be found most useful.

Perhaps the best of all these essays is that headed Fiscal Immunities. No aspect of the survey is more perplexing than the so-called 'beneficial hidation.' Why, for example, should the Archbishop of Canterbury's Kentish manor of Aldintone, with land for 100 ploughs, be rated only at 15 sulungs (and that reduced from 21), when its value T. R. W. was not far from double that of T. R. E.? Most modern writers on Domesday have dealt with the question, with more or less success, but we are not ashamed to confess that we never fully grasped the scope and effect of these immunities as a whole until we read this chapter. It is a masterpiece of skilful analysis and lucid expression.

The custom of granting land by feoffment and without charter was not confined to lands of military tenure, as might perhaps be inferred by a passage on p. 227. Even when charters were practically universal they were considered only as evidence recording the actual transfer by feoffment; the common form, which lasted as long as the charter of feoffment itself,—*dedi, concessi, et per hanc cartam meam confirmavi*—shows this very clearly. We cannot follow the author in his suggestion that the absence of charter evidence was one of the reasons for the speedy formation of regular Courts Baron. Were transfers of freehold land usually or ever completed at such Courts? There is considerable evidence that in the twelfth and early thirteenth centuries, and perhaps later, charters were executed at Hundred or County Courts, but that was probably due to the desire of having as witnesses a number of well-known persons, rather than to any legal necessity of using a Court of any kind for the purpose.

The section dealing with the different types of settlement in England, the scattered farms, the clustered farms or hamlets, and the more condensed settlements or villages, is most instructive. It seems highly probable that

the difference was due to racial or tribal custom. The subject is well worth further study, in combination with the ethnological and philological evidence.

The author finds something new to tell us about manors, especially as to the curious way in which they were consolidated, 'made up,' divided, added and subtracted; and there are some most interesting notes on the *maneriola*, the small manors, many of which appear to have had no demesne. Some of these are also recorded as having no hall, and here we venture to differ somewhat. Unquestionably, as the author points out, *aula* frequently correlates *manerium*, just as *curia* sometimes equates *aula*, but we think that in many of the instances quoted *aula* refers to the actual building and not to the manor; as indeed *manerium* itself sometimes does. When we read of one hide *in qua fuit haula T.R.E. pertinens ad istum manerium* (p. 360), *habuit in civitate XXX mansiones praeter suam hallam* (p. 361), *manerium sine halla* (p. 362), and the like, surely an actual building is referred to; we cannot therefore agree with the author's comment on the Berkshire case quoted on p. 359. The text runs *ipse quoque transportavit hallam et alias domos et pecuniam in alio manerio*, and the comment is 'The abduction of the chattels . . . may perhaps be taken in the literal sense, but in regard to the buildings nothing worse than appropriation to another manor can be meant.' We see no reason to suppose that the actual building was not bodily removed. It would not be difficult to transport a house made of timber framing filled in with wattle and daub, and to re-erect it elsewhere. Several instances of this actually being done occur in the court rolls of the manor of Wakefield[1], in one of which damages were recovered because the defendant had removed [*irradicavit*] a house, and in two other cases, the re-erection on another site is expressly mentioned.

There are ten appendices, containing extracts from illustrative documents, such as Hundred Rolls, Extents, and Court Rolls, and some very elaborate analyses of parts of the Survey itself, which are worthy of careful study.

The book is a noteworthy addition to the literature of the Domesday epoch, and should be read by all students of that period of English history. It is dedicated to the memory of the late Prof. Maitland, and no one would have appreciated its learning more than he.

W. P. B.

The Government of England. By A. Lawrence Lowell, Professor of the Science of Government in Harvard University. Macmillan Co. 1908. 8vo. Two vols. 570 and 563 pp.

Mr. Lowell's treatment of that most difficult subject, the actual working of the government of England, is marked by breadth of view, by skilfulness of workmanship, and by unity of idea.

Among the men who have attempted to portray the actual working of the English constitution at a given date Mr. Lowell stands pre-eminent by the broad way in which he regards his subject. Compare him with two among the most distinguished of his predecessors. Archdeacon Paley's description of the British constitution, hidden away as it is in a single chapter of his 'Principles of Moral and Political Philosophy', contains the best account we possess of the spirit, at any rate, of the government of

[1] Yorkshire Archaeological Society, Record Series, vol. 36, pp. 12, 14, 15.

England towards the end of the eighteenth century. Bagehot's 'English Constitution' gives the truest picture ever drawn of Cabinet government about the middle of the nineteenth century. But Paley and Bagehot are really preoccupied with little else than the relations between the Crown, the Houses of Parliament, and the electorate. They have written little, if anything, about the government of England, except in so far as it is directly connected with that parliamentary government which is to an Englishman the salient trait of a constitutional monarchy. For this they are not to be blamed. At the end of the eighteenth century the elaborate governmental system of to-day had not come into existence; in the middle of the nineteenth century the immense extension of the authority of the State which is now visible to every observer had only begun to arrest attention. But though contrast does not imply censure, the difference between the point of view assumed by Lowell and that occupied by Paley and Bagehot is noteworthy. Of the sixty-seven chapters which make up our author's *Government of England*, the greater number deal exhaustively with topics such as Party Organizations, Local Government, Municipal Trading, Education, the Church Establishments, the Colonies, and the Law Courts, as to which neither Paley nor Bagehot has a word to say. Of the six parts into which Lowell's treatise is divided, the first covers the whole of the ground occupied by the most distinguished among the writers who have tried to deal with the constitution of England as a living organism. Our author reveals for the first time to many English readers the open secret that the government of England at the beginning of the twentieth century has become a far more complicated matter than what is generally known as the English constitution.

Mr. Lowell's literary workmanship displays, to any one who studies it with care, a skill which is likely enough to escape notice. Every page of his book can be easily understood by intelligent readers, and there is not one reader in a hundred who reflects that the reason why he understands some political or constitutional doctrine which, as usually put forward, perplexes even an acute pupil is that his instructor has with infinite labour reduced to a clear form propositions which in the hands of an ordinary teacher remain obscure. One consideration is enough to prove the possession by Mr. Lowell of the gift of luminous exposition. He has solved the problem which invariably perplexes any man whose duty it is to expound the mysteries of English constitutionalism. The puzzle is how to explain the law and the customs of an historical constitution without wandering into a treatise on constitutional history. Mr. Lowell, guided by the rarest literary tact, has introduced into his analysis of the government of England as it actually exists just so much of history, and no more, as is really required to explain the way in which the power of the State is in fact exercised. We are made almost unconsciously to see that, while no one principle or body of principle will account for all the phenomena presented by the modern constitution of England, yet the people of England are in fact governed in accordance with certain ideas not always quite consistent with each other, which originate in and are controlled by historical facts.

Mr. Lowell's treatise lastly presents, in spite of the diversity of the topics with which it deals, a singular unity of idea or purpose. He did not indeed come to the study of our institutions with the desire to establish some preconceived theory. His attitude towards England is in this respect the exact opposite of Tocqueville's position in reference to the United States. This eminent Frenchman, when he came as quite a youth to America, brought with him from France a body of doctrine about democratic society

which colours every page of his 'Democracy in America,' and this unity of idea which gave to Tocqueville's great work its impressiveness lies in the tenacity with which he draws from the supposed experience of popular government in the United States inferences as to democracy in France. Professor Lowell came to England, as his book proves, as a student rather than a teacher. He was not tied to any doctrine. Yet a critic can perceive (what is perhaps not equally visible to our author himself) that Lowell's investigations into the working of the government of England have more and more led him to one definite conclusion, namely, that Party Government, operating on the whole in favourable circumstances, is the leading characteristic of our political institutions, and that this characteristic reappears and makes itself felt under all the various forms of State action. The elaboration of this idea gives to Lowell's *Government of England* its essential unity.

A. V. D.

[It may be useful to call attention to one or two special matters on which Mr. Lowell gives information not to be found in other books of the same kind, or not easily to be found elsewhere at all. A most important one is the steady growth of the power of the leading parliamentary groups in directing policy, which is one direct cause of the Cabinet's increasing autocracy not only in the executive but in the legislative work of government. Mr. Lowell shows at length how both the National Liberal Federation and the National Union of Conservative Associations endeavoured in late years to set up a popular control of their respective parties outside parliamentary rule, and how in both cases the attempt broke down. In what may be called the general jurisprudence of government he points out that the distinction between 'rigid' and 'flexible' constitutions is tending to lose its practical importance, as in many cases the special process of constitutional amendment is not much more troublesome than that of ordinary legislation. Then Mr. Lowell has some excellent remarks on the difficulties of reforming the House of Lords; and we do not know where else to find so good an account of our modern local government system in its practical operation.—F. P.]

International Law applied to the Russo-Japanese War, with the decisions of the Japanese Prize Courts. By SAKUÉ TAKAHASHI. New York: The Banks Law Publishing Company; London: Stevens & Sons, Lim. 1908. 8vo. xviii and 805 pp. (32*s.* net.)

THE Preface to this interesting and useful work is dated on 'the 325th anniversary of Hugo Grotius' birthday'.

The author has long taken rank as one of the foremost Japanese authorities upon International law. In the war with China (1894–5) he was already sufficiently well known in that capacity to be sent out as legal adviser to the commander-in-chief of the Japanese fleet. He subsequently passed a couple of years, first at Oxford and then at Cambridge, while occupied in writing his *Cases on International Law during the Chino-Japanese War*, published in 1899, and on his return to Japan was appointed Professor in the University of Tokio. During the Russo-Japanese War he had ample opportunities, as a member of the legal committee in the Department for Foreign Affairs, for closely following the course of events, and for collecting the material of which he has made such good use in the volume now before us.

Mr. Takahashi rightly holds the Russo-Japanese war to have been 'one of the most important events the world has ever witnessed,' and 'an epoch-making event in the evolution of International Law.' He goes on to point out that it 'has afforded innumerable cases that illustrate almost every article of the Geneva and the Hague conventions relating to Laws and Customs of Land and Naval warfare, and furthermore has presented cases without precedents, suggesting the desirability of a thorough revision of the present laws.' The book deals, accordingly, under appropriate headings with the numerous questions to which the war gave rise. Part I treats 'Of the Outbreak of War, and its effects,' discussing the vexed question whether a declaration of war need precede the first act of hostility; as also the position of subjects of one belligerent found within the territory of the other at the outbreak of war; the days of grace to be allowed to enemy shipping; and the legality of trading with the enemy. Part II relates to 'The Laws and Customs of Land Warfare'; treating of lawful combatants, prisoners, the killed, means of injuring, spies, sieges, capitulations, and occupied territory. Part III deals with 'The Laws of Naval Warfare'; and therein of the sinking of prizes; blockade; hospital ships; war correspondents; and bombardment of coast towns. Part IV, on 'Neutrality,' deals with Russian warships in neutral ports; Russian officers and crews rescued by neutrals; and contraband of war. Part V, on 'Prize Law,' gives an account of the organization of the Japanese Prize Courts, their procedure, and the law administered by them; also supplying reports of the more important cases decided by those courts; classified under the headings of enemy vessels; vessels carrying contraband persons; vessels carrying contraband goods; blockade runners; unneutral services; and released vessels. The utility of the work is enhanced by six important appendices, followed by twenty-two tabular statements.

The author naturally takes the side of his own country in discussing occurrences which have given rise to controversy. He maintains, for instance, that the attack on the Russian fleet at Port Arthur without any formal declaration of war could not under the circumstances be complained of; that the protest of the captains of the British, Italian, and French warships in the Korean harbour of Chemulpo against the attack on the Russian warships lying there was uncalled for; and, what is more open to question, that the capture of the *Ryeshitelni* in the Chinese part of Chefoo was, under the circumstances, justifiable. A good memorandum on this incident will be found at p. 442. Naturally also, the author has a section refuting 'false accusations of the Russian Government against the Japanese army,' and another on 'Russian breaches of the rules of war.' A long chapter is devoted to the sinking of merchant vessels, Japanese and neutral, by Russian cruisers. Here it must be noted that, alike by the Japanese and the Russian regulations, neutral as well as enemy vessels might, under certain circumstances, be destroyed at sea, instead of being taken in for condemnation by a Prize Court. Our own government, it will be remembered, has maintained that such action, so far as neutral ships are concerned, is a breach of international law; a view for which they were unable to gain support at the recent Peace Conference. Professor Takahashi's opinion on this point is somewhat guardedly expressed. He discusses convincingly some objections made to the Japanese instructions as to conditional contraband, with special reference to the case of the *Hsiping*.

The pages to which the reader who has some special acquaintance with

the subject will probably turn with most interest are those (527-754) dealing with 'new cases of Prize Law, added by the decisions of the Japanese Prize Courts.' No less than 124 cases were, it seems, tried by the courts of first instance, and 92 of them went up to the Court of Appeal. They raise several novel questions, and contain many displays of argumentative ingenuity. The study of them, it may be permissible to remark, would be much facilitated were each of them supplied with the familiar 'head-note.' The reports may be read not only for instruction but sometimes also for amusement. In the *Bobrick*, for instance, it was twice naïvely urged on behalf of the owners that there is no fixed international law, but that States should take into consideration the spirit of the times and the most advanced theories of scholars, as expressed, e.g. in the resolutions of the Institute of International Law: *ergo* that enemy property at sea is exempt from capture. The Court was unable to accept these views, and treats as inadmissible 'the advocate's vague argument for governing the solid business of the day by the principle of universal benevolence.' The *Thalia* was a small steamer which had been brought on board the *Progress* (both vessels being the property of a Russian company) and left by her, before the commencement of the war, on dry land in the Hakodate dockyards for repairs. While there, she was captured by order of the captain of a Japanese man-of-war. It was argued for the company that naval capture can be made only of property afloat; that the steamer, having been hauled on shore, was protected from seizure by Arts. 23 and 46 of the Hague Convention as to land warfare, and not being within the 'cas régis par la loi maritime,' was not excepted from the protection guaranteed by Art. 53; that the steamer, so long as she remained on dry land, could do no damage to Japan; that, having been brought on board of another steamer, she was, and still remained, not a ship but cargo, &c. Here also the decision gives no countenance to the argument for the claimant. The questions raised in most of the cases reported are, of course, of a more serious nature.

The account given, in earlier chapters, of the admirable treatment accorded to prisoners should not be left unread. The humane provisions of the Hague Convention upon the subject were scrupulously observed; and many indulgences in excess of those provisions seem to have been granted, when this could safely be done. It may be enough to refer to the erection of separate chapels for prisoners who were of the Roman Catholic, Greek, Mohammedan, or Jewish religion (p. 146), and to the trouble taken to provide a form of oath (p. 107) which could be conscientiously accepted by Russian officers, for whom it was wished to secure freedom of outdoor exercise.

T. E. H.

State and Family in Early Rome. By CHARLES W. L. LAUNSPACH. London: George Bell & Sons. 1908. 8vo. xx and 288 pp. (7*s.* 6*d.* net.)

MR. LAUNSPACH limits the scope of his work to the 'infancy and adolescence of Rome,' as to which plausible conjecture must necessarily to a large extent take the place of accurate knowledge. His central idea is that 'the early Roman state was a conscious imitation of the ancient Gens or ancient family,' based on kinship and still more on community of religious cult, but modified in its gradual development both by internal economic and constitutional forces and by external foreign influences,

at first Etruscan and Hellenic, afterwards African, Asiatic, and world-wide.

Our author follows M. Fustel de Coulanges in the paramount importance which he attributes to the worship of dead ancestors and the performance of the 'sacra.' He points out that the basis of a gens was not so much the natural ties of kinship or race as the ties which might be created artificially as well as naturally for the maintenance at the same tribal altar of a *common ritual*, in dutiful obedience to 'a real or reputed kinsman, generally long dead, and not always ascertainable': but that though Rome was formed by the union of gentes and based on gentile organization, the gens itself was disintegrating, when Rome was first consolidated, the agnatic family becoming now the civil unit of the State, under the headship of the Paterfamilias, and originating the Jus Privatum as the gens had originated the Jus Publicum.

The work goes on to trace the evolution of the Roman Constitution and sketches the early growth of Roman Private Law, but does not profess or attempt to deal with the wonderful development of mature Roman Law through the agency of Juristic Interpretation and the Praetor's edict.

Mr. Launspach claims 'to rigidly exclude the merely picturesque and dramatic,' but the reader will not complain of his letting himself go over a very graphic and interesting reconstruction of the ceremonies of a Roman wedding (pp. 150–5). The conjecture of Cuq, which he adopts, that Confarreatio was originally usual in the case of the marriage of persons of different gentes only appears to be ingenious rather than convincing.

As to matters of fact the work is careful and accurate. The style is pleasant and readable, though somewhat marred by the too frequent use of unusual or obsolete words, e. g. 'clerisy,' 'sacerdocy,' 'memorize,' 'compulsitor,' 'antagonised,' 'theftuously,' 'timeously.' The many references to standard and up-to-date authorities show wide reading, and the use made of them indicates sound scholarship and extensive knowledge.

S. H. L.

Die Trennung von Staat und Kirche. Von Karl Rothenbücher. Munich: C. H. Beck'sche Verlagsbuchhandlung. 1908. 8vo. xv and 475 pp. (M. 14.)

This is a remarkable book, which ought not to be left unread by any person, lawyer or layman, who takes an interest in the relations between Church and State. Its object is to give an analysis of these relations in the countries in which the system of 'separation' prevails. There are, as the author shows, three possible systems: (*a*) the system of a complete union between Church and State which theoretically prevails in the countries in which one Church is established as the State Church (e. g. in England, Scotland, Austria, Spain, Russia, &c.); (*b*) the system of free Churches in a free State, which prevails in the countries in which several churches are established as authorities recognized by Public Law (e. g. in several German States, in Belgium, Italy, &c.); (*c*) the system of separation which prevails in the countries in which religious communities are looked upon as associations belonging to the domain of private law (e. g. in Ireland, the United States of America, France after the Separation Law, &c., &c.). The complete Union of Church and State was a postulate of mediaeval, political and religious doctrine. In the struggles between the

ecclesiastical and civil authorities which occurred in all Christian countries during the Middle Ages the separation of Church and State was not claimed on either side. The objects to be attained by the Reformation did not include the severance of the tie between Church and State. Dr. Rothenbücher shows that Luther's conception of the Christian Church as an invisible body, differing in every respect from the ecclesiastical organization which usurped that name, sowed the first seeds of the ideas which brought on the movement for separation, but that the Protestant leaders did not either originate or encourage such a movement. In the countries in which the reformed religion was introduced a redistribution of the respective functions of the civil and the ecclesiastical authorities took place, but the union between the secular and the spiritual power was continued. Dr. Rothenbücher shows that it was by the Anabaptist sect that the claim for a separation was for the first time raised in a deliberate manner. This appears particularly from the writings of Balthasar Hubmaier, from which interesting quotations are given. The well-known attempt to establish an independent Anabaptist community failed after a short trial, but the sect survived in a number of localities, particularly in Holland, and its teachings promoted the Puritan movement in this country and the formation of new communities in America in which the separation of Church and State was for the first time established as a constitutional principle. The principle of separation did not, however, become generally popular. As shown by Dr. Rothenbücher, even philosophers as liberal in their theological views as Spinoza and Hume were in theory in favour of a union between Church and State. Neither Voltaire nor Rousseau were advocates of a separation, and during the first stages of the French revolution the substitution of a more rational cult for that of the existing Church was aimed at, but the new cult was to be a State institution like that of the Church which it was to replace. There were, however, several tendencies at work which operated in favour of separation from various points of view. Among these tendencies the teachings of the adherents of the 'natural law doctrine'—who on *a priori* grounds upheld the importance of the distinction between political and the ecclesiastical organizations—did not have an immediate effect on popular feeling but, through the influence which they exercised on widely read writers like Kant and Fichte, gave an indirect stimulus to the separation movement. A more direct and more potent influence was exercised by theologians like Schleiermacher and Vinet, who advocated a religion of a deeper and less mechanical nature than that which characterized the official Churches, and on the other side by Catholics like Joseph de Maistre Lammenais and Montalembert, who by the severance of the ties between Church and State hoped to increase the powers of the Papacy. The agitation for a separation of Church and State from the point of view of political liberalism is another factor by which the movement was intensified.

The sketch thus outlined of the history of the intellectual influences which promoted the desire for the separation of Church and State is followed by an account of the methods by which the separation was brought about in the countries in which the desire was carried out. The largest space is of course given to an account of the causes of the French Separation Law and of the manner in which it has operated so far.

English readers will be specially interested in the description of the developments in America. The Puritan settlers were opposed in theory to the principle of a State Church, but they wished to form communities

consisting exclusively of members of their own persuasion, with the result that in most of the Colonies which they founded the union of Church and State was more complete than in the mother country. In Virginia and Carolina the Church of England was the established Church down to the date of the secession. In other colonies ecclesiastical matters were in a continuous state of change. Rhode Island and Pennsylvania were the only American Colonies in which the separation between Church and State was consistently maintained from the beginning. The secession of the American Colonies from Great Britain and the formation of the Union, coupled with the increase of immigration from various countries, led to a gradual disappearance of the State Churches; when in 1833 the Church of Massachusetts was disestablished the separation of Church and State was complete throughout the United States. In Dr. Rothenbücher's opinion the separation movement in America was mainly characterized by the pronounced religious feeling which appeared to be its guiding motive. The description of the present position of the religious denominations in the several States which follows the account of their history is as lucid and complete as the other portions of the book. Dr. Rothenbücher is specially impressed by the concessions made to the Roman Church, which appears to have more real power in the United States than in some of the countries in which it is the established State Church.

As shown by Dr. Rothenbücher throughout his book, the separation of Church and State does not necessarily imply a complete neutrality of the State in religious matters; such a neutrality is in fact impossible. The form of the oath administered in the Courts or required to be sworn by public officials or members of the legislature on the assumption of their respective duties, the rules as to the validity of marriages and divorces, the nature of the religious or moral education to be supplied in the Schools maintained or supported by public authorities, the form of the ceremonial used in the case of any public solemnities, the manner of dealing with utterances opposed to the received theological opinions,—all these are matters on which the law or the custom of every political community must, and in actual fact does, take a more or less decided view. On these points also Dr. Rothenbücher's book contains abundant and interesting information.

Perhaps some day the author will in another work describe the constitutional position of the established Churches and of the Nonconformist religious communities in the countries in which the Union of Church and State is still maintained. Such a book would be as interesting and valuable to the comparative constitutional lawyer as the admirable volume to which this notice refers. E. S.

Die Theorie der Verwahrlosung und das System der Ersatzerziehung. Von Dr. Heinrich Reicher. Vienna: Manz. 1908. 8vo. viii and 388 pp.

This is the third volume of a work dealing with the law as to neglected, destitute, mentally deficient, and criminal children. In the present volume the author, after explaining the term 'Verwahrlosung' as applied by him (want of adequate care), gives a survey of the several grounds on which the public authorities of a number of countries (Austria, England, France, Germany, Switzerland) are justified in interfering where such 'Verwahrlosung' occurs, and of the manner in which such interference is carried

out. The remaining part of the volume contains a summary of the statutory provisions existing in the countries referred to as to the education and care substituted by the State in reformatory and industrial schools and similar institutions for the education and care which in normal cases is provided by the parents. As far as we can judge the information supplied by the author is accurate and complete. The details of the English Children's Bill, which before or shortly after the publication of this notice will probably have been transformed into the Children's Act, 1908, were of course unknown when the book under review was printed, but the existence of the Bill is mentioned in a footnote.

Some reference to the French 'cantines scolaires' and to the English statutory provisions as to the supply of meals to children attending public elementary schools would have been desirable. Dr. Reicher's book will be of great assistance to any person interested in the important subject with which it deals. E. S.

Butterworth's Ten Years' Digest of Reported Cases, 1898 to 1907. Issued under the general editorship of SIDNEY W. CLARKE, with the co-operation of C. C. M. PLUMPTRE, W. F. LAWRENCE, F. J. COLTMAN, M. R. EMANUEL, W. VALENTINE BALL, E. L. HOPKINS, and HARRY CLOVER. London: Butterworth & Co. 1908. In Four Vols. La. 8vo. Vol. I, 1355 pp.; Vol. II, 1258 pp.; Vol. III, 1246 pp.; Vol. IV, 362 pp. (£3 3*s.* net for the entire work.)

A DIGEST of reported cases is always welcome, and when it covers such a long period as that of ten years it is received with open arms. Messrs. Butterworth's digest is quite an armful with its 4,221 pages and notes of 9,300 cases. The classification of the work is based on that of the publishers' other publications, the Encyclopaedia of Forms and Precedents and Lord Halsbury's Laws of England, with such modifications as the nature of a digest requires. It is claimed for this digest, in the publishers' note, that it includes practically every case reported during the ten years as decided in the English Courts, together with a large number of cases from Scotland and Ireland. Each page is in two columns, and each main heading is in thick black type. References may easily be made from one heading to another, and when the note of a case refers to some other decision there is a further reference to the column of the digest in which that case can be found. There are, of course, many headings under which will be found cross-references to other headings, but to each of the principal headings — such as Bankruptcy and Companies — a separate table of contents is prefixed. The digest proper occupies the whole of three volumes. The fourth and smallest volume contains (1) a list of words, terms and phrases considered or explained in the cases digested; (2) an alphabetical list of cases affirmed, reversed, overruled, followed or considered; and (3) an alphabetical table of the cases digested, stating the year of the decision or the report of it, and referring to the volume of the digest, and the number of the column thereof, in which each case is noted.

It is only after a digest has been frequently consulted that one can give a sound opinion whether it is well arranged or otherwise, but, so far as the reviewer has tested the four volumes, they seem to be very well put together. The Yearly Digest, another work published by Messrs. Butter-

worth & Co., has frequently received a favourable review in these columns, and it is announced that the arrangement of the ten years' digest will be followed in future issues of the Yearly Digest, and in the quarterly divisions which are to become a feature of that publication. With so many new law books, new editions of law books, and digests, annual or otherwise, it is to be hoped that practitioners may be relieved from the wearisome task of noting up the reports themselves. To those who have fallen into arrear with such work the Ten Years' Digest will indeed come as a boon. F. E.

Hindu Family Law, as administered in British India. By ERNEST JOHN TREVELYAN, Reader in Indian Law in the University of Oxford; late a Judge of the High Court at Calcutta. London: Thacker & Co. 1908. La. 8vo. 392 pp. (25*s.* net.)

THIS is a work which, when completed, will be of valuable assistance to the Indian practitioner. We say 'when completed,' because it is in its present shape manifestly incomplete; thus, there is no mention of such important subjects as Wills and Inheritance. We say 'the Indian practitioner,' because the chief value of the book lies in the footnotes, in which are numerous references to the last editions of works of Hindu lawyers (such as G. C. Sarkar's Law of Adoption, and the same author's Hindu Law, Sir Gurudas Banerji's Law of Marriage and Stridhan, Bhattacharya's Law of Joint Hindu Family, and the same author's Hindu Law, and other similar works), which are not generally accessible to students, even in India; also every possible reported case seems to be noted, and not many of the old reports are available, certainly to very few students in England. But as a collection of simple propositions, based on numerous authorities, the references to which are always given, the book will be invaluable. It remains for the practitioner to look up each authority, and note carefully whether the cases can be distinguished.

Where Dr. Trevelyan submits his own opinion, contrary to any authority or reported case, he does so cautiously and on grounds well worthy of consideration.

We are glad to notice that in dealing with the subject of the right of a Hindu widow to adopt a son to her deceased husband, and the consequences of such an adoption—a subject fruitful of litigation in India—Dr. Trevelyan enunciates the law clearly. Thus (pp. 130–1) 'a widow's power to adopt is *at an end for all purposes*, as soon as the estate of her husband is vested in an heir (other than herself) of his natural or adopted son, or of his son's son, or son's son's son who has inherited to him, and is *not revived* by the death of such heir, even when on such death she herself succeeds to the property which was of her husband, and therefore by adopting devests no estate but her own. This rule applies, whether there be an express power given by the husband, or such power be implied, as in the Maharashtra School, or the power be exerciseable with the consent of the sapindas.'

And further on (p. 198), with certain exceptions which it is unnecessary to particularize, 'adoption by a widow does not devest any estate of inheritance, which has been taken by a person, as heir of a male holder other than the person to whom the adoption was made.' As Chief Justice Peacock said (quoted by Dr. Trevelyan, p. 199) 'there is no case in which an estate vested by inheritance can be devested by the adoption of a son by a widow after her husband's death.' And Dr. Trevelyan adds (p. 201),

'It is submitted that an estate cannot be devested by the mere consent of the person in whom it is vested.'

The foundation for these principles is a ruling of the Privy Council, given so long ago as 1865, in a famous leading case, generally known as *Chandrabullee's* case. It is that the power of a Hindu widow to adopt a son is limited. Thus, where a Hindu dies, leaving a widow and a son, and that son subsequently dies, leaving no son, but his own widow, the power of the former widow to adopt is *at an end*, and can never afterwards be revived, even though (as, for instance, by the death of the son's widow issueless, or without having adopted a son) the estate becomes vested in her. It follows that if she cannot by her assent revive an extinct power to adopt, to be exercised by herself, equally she cannot do so, if she intends the power to be exercised by some one else.

Perhaps the most striking illustration of this principle was the following case, which is quoted by Dr. Trevelyan (p. 198) among the numerous illustrations given by him. A died, leaving a widow, B, and a son, C, by another wife (predeceased). C died unmarried, and the estate became vested in a collateral, X, who gave his son, D, to be adopted by the widow B. It was held—and this ruling has never been directly disputed—that though X consented to the adoption by B (he was the natural father of the adoptive son), B's power to adopt was *at an end*, for on her stepson dying unmarried, she did not succeed as heir, and the fact that the heir wished her to adopt could not validate the adoption. It may be said that possibly this principle may not be in accordance with either the strict letter or the spirit of the Hindu law as expounded in the books, or as understood by the Hindus themselves, and that this may be an illustration of a hard and fast line laid down by judges in London, governing all the courts in India, in a matter which, if left to a natural development of the Native Law, might possibly have resulted in a different principle. A learned Hindu judge who, while professing to follow the ruling of the Privy Council, delivered more than one judgment in conflict with it, said:—'Nothing is more common in this country than to find that parents when they grow old, and have the misfortune of losing an only son in their old age, leaving a young (and sonless) widow behind, think it their duty to console that widow for the loss she has suffered by permitting her to adopt a son in preference to adopting a son themselves.' This is quite true; and if the widow of the predeceased son exercises the power of adoption during her father-in-law's life, no obstacle can be raised on account of the dictum of the Privy Council. But it must be during the father-in-law's life, for on his death his estate becomes vested *by inheritance* in his own widow: she can adopt, but she cannot authorize her daughter-in-law to adopt: the latter's power is no longer in existence. Such is the result of the ruling of the Privy Council, and the Courts in India are bound thereby.

No doubt some attempts have been made by the Courts in India to avoid the rule laid down by the Privy Council. The first attempt was made at Calcutta; and, curiously enough, this took place in connexion with the same family and the same property as were the subject of the leading case (*Chandrabullee's*) in which the ruling was enunciated. The 'adopted son' obtained possession of the property, and resisted the attack made to oust him by the collateral heirs. The High Court at Calcutta supported him, opining that the rejection of his status as adopted son in the leading case was intended by the Judicial Committee of the Privy Council to be limited to the circumstances of that case. But on further appeal to the Privy Council that view was not approved; and the ruling was clearly

enunciated that the adoption was invalid under all circumstances, for the power of the adoptive mother was 'at an end'; nothing could revive it.

In Western India, besides the judgements of the learned Hindu judge, already referred to, there is a comparatively recent decision of the late Chief Justice, Bombay, which is in conflict with the ruling of the Privy Council. It was a case in which there were two brothers, S and B, found to be divided in estate. S died, leaving his widow B_1, and B_2 the widow of his predeceased son. Thus on the death of S, his estate was vested in his own widow B_1. B_2 adopted a son, who claimed to oust B_1 on the ground that B_1 had consented to his adoption. A preliminary question arose whether B_1 had been legally married to S. 'In case that is determined in the affirmative,' said the learned Chief Justice, 'it will be necessary to consider whether B_1 consented at the time of the adoption of a son by B_2.' But such a question could never arise. For, to quote Dr. Trevelyan again, p. 201, 'an estate cannot be devested by the mere consent of the person in whom it is vested.' And he adds, 'this seems to be in accordance with the weight of authority,' giving in a footnote a reference to the five Bombay cases, in which a different view was expressed. They are (1) *Payapa* v. *Apamma*, 23 Bom. 327, at pp. 331–2; (2) *Gopal* v. *Vishnu*, 23 Bom. 250; (3) *Babu* v. *Ratnoji*, 21 Bom. 819; (4) *Rupchand* v. *Rakhmabai*, 8 Bom., High Court, Appellate Cases, 114, at p. 122; and (5) the case just quoted, *Bhimappa* v. *Bassawa*, 29 Bom. 400. It is interesting to note that as recently as June of the present year a Division Bench of the Bombay High Court doubted whether the decision in *Payapa* v. *Apamma* (see above), which at the time it was given was considered by its authors as finally laying down the law on the point in question, can now be regarded as a binding authority. No doubt in time the five cases noted above will be authoritatively overruled, and the law will then be expounded as shown by Dr. Trevelyan.

Dr. Trevelyan goes on to make a very apposite remark: 'Even if consent can operate to devest an estate, a distinction might well be made between the cases in which the person so consenting is a full owner, and those in which the estate is vested in a qualified owner; in which latter cases the rights of the reversioners could scarcely be qualified by the consent'; and he shows in a footnote that this distinction was not made in the Bombay cases, to which he takes objection. For instance, in the most recent case just quoted, *Bhimappa* v. *Bassawa*, B_1 as the widow of S was only a qualified owner. Conversely, in the case also quoted above, where the estate was vested in the natural father, his consent was held to be of no avail, though he was the full owner, and had given his son in adoption. On pp. 198, 199, Dr. Trevelyan, in support of his view, has drawn out a series of illustrations, all taken from reported cases, the references to which are given in the footnotes. In Illustration (vi) it should have been noted that the widow D had express authority from her husband to adopt a son; and in the footnote (3) to the case 'E' is clearly a misprint for 'F': also in the same footnote 'E (F) could have succeeded against C' should be 'F would have been entitled to share with C.'

Illustration (viii) is given as the case of *Rupchand* v. *Rakhmabai*, referred to above, in which the decision of the Bombay High Court was, not as in the illustration, that E cannot oust D, but that E can oust D, because D consented to the adoption which would otherwise have been invalid; and this ground is shown elsewhere by Dr. Trevelyan to be contrary to the weight of authority.

We have thought it well to take one important subject in Hindu Law as illustrative of the exhaustive manner in which Dr. Trevelyan's work has been accomplished. The book is excellently got up and well printed, a contrast to Indian law books which are printed in India, and which irritate the student by numerous errors of the press. Only two slips attracted our notice: on p. 128, l. 14, for 'if' one should read 'unless,' otherwise the meaning is exactly the contrary of what the author intends; and on p. 139, note 4, l. 7, for 'marriage' read 'adoption': a male is not removed from his natural family by marriage.

The Common Law and Statutory Duty and Liability of Employers. By His Honour Judge WALWORTH HOWLAND ROBERTS and GEORGE WALLACE, assisted by ARTHUR HARINGTON GRAHAM. Fourth Edition. London: Butterworth & Co. 1908. La. 8vo. lxxxiii and 1014 pp., with index of 120 pp.

THE writer of this notice is the happy possessor of copies of the early editions of this work. The first edition notably, when placed beside its mammoth offspring, cannot fail to recall the parable of the grain of mustard seed which, when it is sown in the earth, is less than all the seeds that be in the earth, but becometh greater than all herbs and shooteth out great branches. The first edition is small amongst pamphlets; in a couple of hours it could be read from cover to cover; this last is become in bulk an encyclopaedia and of respectable rank materially even amongst its portly peers. At the moment amongst single-volume law books, this writer can think of none but itself to be its parallel: unless, perchance, Addison on Contracts; but Addison covers a vastly wider ground, and has, besides, a respectable antiquity with which to palliate portliness and the services of many editors to pamper it; while Judge Roberts's book, so far as the bulk of it goes—650 pages, without reckoning the index, are devoted to the Workmen's Compensation Act alone—is in the swaddling clothes of infancy. What proportions it will attain to after, say, half a century of judicial decisions, if they come in anything like the affluence of those under the earlier Act, is a contemplation not unattended by awe. This book, as a specimen of the printer's, publisher's, and binder's art, leaves nothing to be hoped for; yet, as we admire, the inquiry will intrude, how will its proud possessors bear it from place to place to perform its work of illumination or of confutation? The Times newspaper has provided for any copy of its Encyclopaedia a case of many advertised beauties and virtues wherein its volumes may be fitted and revolve—and of marvellous cheapness. The publishers of this mighty volume might provide some vehicle of the go-cart sort, or gun-carriage perhaps, by which the disputatious solicitor might bear it along to the field of action—the forum of the County Court; for certainly his ordinary bag will not contain it, even if he has the vigour to carry it.

But to dally no longer with its physical features, the book is divided into four portions. Chapters i to vii to page 242 deal with the Master's Common Law and Statutory Duty previously to the Employers' Liability Act. This is familiar ground, and is covered with great detail and minuteness. The arrangement does not seem notably lucid, but everything proper is there, and everything is sufficiently stated.

From Chapter ix to Chapter xii down to page 349 the Employers' Liability Act, 1880, is treated. Then there is a sort of enclave made which logically would seem to belong to the first division, but which for reasons

not evident is separated therefrom; so that the treatment of death as affecting rights of action, damages, and defences available in actions for tortious wrong is sandwiched between general duties and workmen's compensation, to page 466; thence to the end follows the Workmen's Compensation Act, 1906..

In the earlier portions of the book nothing appears novel in treatment or unfamiliar in matter. The note of thoroughness pervades the book from beginning to end, but so also does the note of conventionality. The questions as they arise are treated with full reference to the authorities, and with a respectful regard to them which is the very pink of propriety. This may not be a defect in a law book—very likely it is not—but in so vast a bulk it sadly diminishes one's interest in perusal to know that we shall not be allowed an inch off the *via trita* trod by any number of dreary folk like ourselves. To illustrate what we mean, *Hall* v. *Hollander*, 4 B. & C. 660, 28 R. R. 437, is quoted by the books one after another as authority for two propositions—one of them does not concern us here. It is the case of a child who was much injured, through the trespass of the defendant, and 'at first was taken to the Middlesex Hospital, where he might have remained without expense to his father, but he was afterwards taken home by his father, who thought he would be better there.' The Court thought that 'it was not established by evidence at the trial that the father was necessarily put to any expense; the Court are, therefore, not called upon to give any opinion upon his right to recover such expenses,' i. e. the extra cost that, had the father been thrifty for his son's undoer and possibly regardless of his child's comfort (the child was only two and a half years old), would have been defrayed by the Middlesex Hospital. Surely a principle of this sort laid down by three judges of the King's Bench of the highest authority calls for some comment one way or another in a serious treatise like this. Is there an obligation on one whose child is injured by the wrongful act of another to save the wrongdoer's pocket by having the sufferer treated away from home at the expense of charity funds?

Again, to take a recent case, there is a decision of the Court of Appeal, *Thompson* v. *City Glass Bottle Co.* [1902] 1 K. B. 233, noticed at p. 281. The decision is a stimulating one whatever view may be taken of the conflict of authority. Mr. Ruegg, by no means a captious critic of authority, hesitates a doubt about it in his book (7th ed. p. 92). Other writers like Mr. Labatt have queried it too; but Judge Roberts and his brother workmen give no indication that any one could be off assenting to the decision; or if they are, they are objects for pity, not for enlightenment. This is probably due to a whole-hearted faith in Lord Collins, whose view prevailed there, and to whom the book is felicitously dedicated. Yet the truest homage is the way in which throughout his Lordship's least word is appealed to as the last word. This, however, applies more to the next section of the book.

Another matter that is noticeable is illustrated on the page from which we have just quoted. The authors seem extraordinarily elated when an opinion they have expressed has subsequently received judicial sanction, and they haste to record the fact as if it were a matter of surprise. The two senior authors (and they only are concerned in this) are persons of such standing, experience and distinction in the profession that they should be neither surprised nor elated at their deliberate judgments coinciding with the reported opinions of some at least of his Majesty's judges. Strangely enough the authors do not call attention to those occasions,

as e. g. only, at p. 269, regarding the definition of Railway Servants, or at p. 464 regarding the Truck Act, where judicial decisions have quenched fond opinions. See Wallace & Roberts, Employers' Liability (3rd ed.) 231 and 465–6. In law authority is of great weight, but surely principle is of more. Lord Halsbury's aphorism, 'the law is not always logical at all,' had best be left for Lord Halsbury to illustrate in that jurisdiction which, under his guidance, has declared itself infallible. Sir Edward Coke's *lex plus laudatur quando ratione probatur* is a safer guide to those of a less powerful pinion.

The most distinctive as well as the most bulky portion of the book is that part devoted to the Workmen's Compensation Act. Whereunto the principles engrafted in the Act may grow no careful person would care to say. It is sufficiently startling to find it enacted law that if a working man by 'serious and wilful misconduct' disables himself and kills and nearly ruins his employer by the wreckage of his property that he has wrought, the widow and children are to maintain him for life out of any pittance they may have left up to £1 a week; while if the workman but stops short of causing himself serious and permanent disablement, he has himself to bear his burthen (s. 1 (2) (c) and First Schedule (1) (b)). However, the law as it is enacted is very exhaustively dealt with in Messrs. Roberts, Wallace, and Graham's treatise. One gathers from the preface that the writing is in the first instance the work of Mr. Graham, to whom the most unstinting praise is due for the laborious thoroughness and completeness with which he has collected and presented every authority or document bearing on his subject with accuracy almost flawless. There is no book on the Workmen's Compensation Act, 1906, yet produced which is even in the same class with Messrs. Roberts, Wallace, and Graham's, let alone a rival to it. Not a decision nor an order but is presented in every aspect that can strike the ordinary man. This indeed is the weakness of the book. There is an enormous appendix (235 pp.) consisting of rules and regulations which are again all but literally transcribed in the body of the work: in effect printed twice; in some cases even three times. How to deal with complex rules that have to be set out somewhere *in extenso* and commented upon in another connexion is a not easy problem to solve. The solution is surely not to print them once in the text unadorned, another time with comment, and a third time in an appendix as rules merely, all in a bundle. Probably the best way is to treat the system of procedure that the rules are intended to mould by way of general indication in the text, and to leave the rules to speak for themselves in detail; unless in any case they present a knot or have a history that wants recording, either of which contingencies may befall if they happen to be ill drawn.

The problems of the Act, as these are matters of speculation and not matter that has been decided, are usually ignored. True, the case of an accident occurring outside the United Kingdom, and the practical difficulties of bringing a claim, are noticed (p. 493), but generally the objection holds. Thus take the First Schedule (2) (b) dealing with 'concurrent contracts.' This subsection is likely to be the subject of much discussion. It opens up the whole range of questions arising out of casual employment at the docks, and the mutual bearings of subsections (a) and (b); yet there is no attempt to deal with it, not even so far as the inclusion of 'concurrent contracts' as a heading in the, generally, most admirable index.

The heading 'Workmen's Compensation Act' in the index is a marvel of close, accurate, and complete analysis. At first sight the full beauty of the arrangement is not obvious, but when the system on which it is

constructed has been grasped one is in possession of a very available key to the treasures of work and care, elaboration and knowledge of the book.

The table of cases would have been more satisfactory had not a measure of economy, probably at the very last moment, been resorted to whereby the reference in the text is not repeated in the table. This makes the table of greatly diminished value when it is sought to be used independently of the book, or of that passage in the book where the most valuable case reference is to be found. We have noticed, as they seem to us, some small blemishes, but our judgment on the whole work is that it is a production of much care, learning, and judgment, and bound to be of great value to those who are wise enough to use it.

The Law of the Federal and State Constitutions of the United States. With an historical study of their principles, a chronological table of English social legislation, and a comparative digest of the Constitutions of the forty-six States. By FREDERIC JESUP STIMSON. Boston: The Boston Book Co. 1908. La. 8vo. xxii and 386 pp.: analytic diagram as frontispiece.

PROF. STIMSON is an admirable digester of modern constitutional documents, but readers of his introductory chapters must be warned against putting their trust in his earlier English history. We rub our eyes when we find him, in the teeth of all recent expounders from Stubbs to Dr. McKechnie, still identifying the 'judgment of his peers' of Magna Carta with trial by jury. The mistake is doubtless old, but the correction should by this time be familiar to learned persons. Every one who has read any thirteenth-century documents knows that the verdict of an inquest, whatever it may be, is not 'iudicium.' To connect it with 'lex terrae' is more plausible: but if it had really been 'lex terrae' there would have been no occasion to ask a prisoner how he would be tried, and no room for him to refuse to plead before a jury. Certainly we find about the beginning of the fourteenth century that jury trial is already 'lex communis,' though strictly not enforceable, but we also find a knight charged with felony demanding and, what is more, obtaining a jury of knights in the name of 'iudicium parium suorum': 'ego sum miles et non debeo iudicari nisi per meos pares'; Y. B. 30 & 31 Ed. I, ed. Horwood, p. 531. Then the statement that 'there was probably never any legal torture in England, though once or twice (!) the rack was introduced' is confused and misleading (a footnote later in the volume is more nearly correct). Torture was never recognized by the Common Law; that is not probable but certain. But throughout the sixteenth and in the early seventeenth century it was an admitted instrument of the King's prerogative in the process of criminal investigation exercised by his Council outside the course of the Common Law. It was not illegal, but extra-legal; it would be absurd to suppose that Elizabeth's and James I's great officers either did not know the law or thought they were breaking it. Judges who were members of the Privy Council did many things as Councillors of which they could know nothing as judges. Again, it is clear that Prof. Stimson has never grasped the medieval sense of 'libertas,' which is quite different from that of 'liberty' and the 'blessings of liberty' as current in modern politics. It would appear that on some points he has gone astray by following Taswell-Langmead's Constitutional History, a book not without merit, but, as any medievalist at Harvard could have

told him, to be used with much discretion. It is strange that a Harvard professor should treat Taswell-Langmead as authority when he might cite Thayer or Mr. Lawrence Lowell. It is still more curious to represent Coke as complaining of the Star Chamber: in fact he called it 'the most honourable court (our Parliament excepted) that is in the Christian world,' with only a vague proviso as to 'the right institution and ancient orders thereof being observed.' But we find here even an echo of the old common lawyers' and parliament men's jealousy of Chancery and injunctions. It is by a mere slip of the pen, we presume, that the full name of Herbert Spencer (whose ignorance of legal history was profound even for a layman) is twice substituted (pp. 27, 95) for that of George Spence, who wrote a book full of excellent learning on the Equitable Jurisdiction of the Court of Chancery. The erroneous short references 'Spencer,' 'H. Spencer' also occur. Altogether, students will have to remember that Prof. Stimson's constitutional history is of the Blackstonian type if not yet more archaic. And yet Prof. Stimson is at least fairly well acquainted with the material facts. We rather guess his real position about Magna Carta to be that what people supposed, in the fourteenth or seventeenth century, that the Charter had said was often more important for constitutional development than what it really did say. This, in our opinion, is quite true; but why wrap it up in fictions? It must not be assumed that pseudo-historical dogmas are not capable at this day of an active and mischievous influence on legislation.

Passing to the more practical part of Prof. Stimson's work, we can only say that it appears to us to be as well done as possible. Young legislatures, it would seem, have to sow their wild oats in a debauch of crude statute-making; and, by way of reaction against this, there is a tendency in the newer States to fetter the ordinary legislative power by stringent constitutional provisions. 'It may generally be said that the Constitutions of the Western States are more elaborate, more cumbrous, and more frequently amended than those of the Eastern.' Hence also the tendency, now a quarter of a century old if not more, to embody special legislation on matters of local interest—such as regulation of grain elevators, to take the early and well-known case of Illinois—in the State constitution, although the matters in question may have nothing to do with constitutional law or even public law of any kind, as understood by European publicists. Another institution peculiar to the United States among English-speaking countries is the protection of juries from excessive judicial guidance. 'Several State Constitutions provide'—and we believe that in other States ordinary statutes have provided—'that the judge shall not charge juries as to matter of fact, or comment thereon, but they [judges] may state the testimony and declare the law.'

The Law and Commercial Usage of Patents, Designs and Trade Marks. By KENNETH R. SWAN. London: Archibald Constable & Co. 1908. 8vo. xvi and 350 pp., index 36 pp. (6*s.* net.)

THIS book affords an excellent example of the possibility of an adequate consideration of the law of Patents, Designs, and Trade Marks within a reasonable compass, and at the same time serves as a protest against the enormous tomes which are so often thought to be necessary for legal exposition. English patent law accounts for 205 pages, foreign patent law for 34 pages, while the remainder of the volume is taken up with Designs, 37 pages, and Trade Marks, 88 pages. The author has evidently profited

by the discussions and studies of recent years, and, by the publication of this book, has materially assisted in raising the consideration of the subjects in question from a mere collection of 'cuttings' to a connected and well-articulated record of existing law. Principles are clearly laid out, together with a sufficiency of case-law to give the work a practical character. The chapters upon the legal and commercial value of patents and upon the action for infringement are especially good. A few instances may perhaps be adduced where professional opinion is not altogether in accord with that of the author. Thus as regards the practice of the Patent Office in the citation of 'anticipations' during the 'application' stages, allusions are made to official objections being 'well founded' or 'unfounded' and so on (p. 81). These scarcely touch the matter since, for the reason that every invention can be found to be previously described in part, this point is seldom in question. The question is rather whether the specifications, which have been cited by the Patent Office, are of such cogency that, in the interest of the public, they should be pointed out. Disagreeing with the author (p. 83), we humbly conceive that as a result of proceedings during the examination of an application for a patent, the doctrine of *res iudicata* in subsequent 'opposition' proceedings does not apply, as the issue in opposition proceedings is not necessarily the same as on the official examination. In view of *Peck* v. *Hindes* [1898] 15 R.P.C. 113, it is hardly true to say (p. 154) that 'Although this section [4 of the Statute of Monopolies] still remains uncodified, no advantage seems to have been taken of it.' Some of the passages upon the infringement of patents might have been shortened and the subject clarified if emphasis had been placed upon the judicial construction of specifications. With an authoritative utterance as to the limits of the invention, the majority of the difficulties in connexion with a patent vanish. As regards trade marks, *Somatose* was not expunged as stated (p. 300). It was at first refused registration, but as a result of the *Solio* case in the House of Lords ([1898] 15 R.P.C. 476) the word *Somatose* was subsequently placed on the trade mark register. The statement (p. 305) 'Whether a mark is distinctive or not is a question to be determined solely by comparison with other marks used or registered in connexion with the same description of goods' scarcely draws sufficient attention to the wide discretion given to the Registrar by section 9 of the Act of 1905, where the fact that an unregistered mark has proved actually in use to be distinctive serves as a criterion for registration.

The publishers have been somewhat unfortunate in their use of 'loaded' paper, thus appreciably adding to the weight and thickness of a book otherwise well adapted for hand use.

The work may well be recommended. The student with this before him may pass directly to reported cases, and the commercial man may obtain from it all the information, short of professional assistance, that he may reasonably require.

A Critical Study of the Form of Letters Patent for Inventions. By Percy C. Rushen. London: Stevens & Sons, Lim. 1908. 12mo. 124 pp. (3*s.* 6*d.* net.)

The main object of this brochure is, we learn, 'to bring together all that may be stated in reference to the subject, and to concisely deal with the forms of effective Patents, clause by clause, from the critical student's point of view, in the hope that we may not fail to appreciate, in one instance at least, the inferiority of our mental powers in regard to exact

diction compared to those of our forefathers. Cheap and free education is at the root of nearly all our costly litigation,' &c., &c. The criticism which is directed against the wording of the letters patent is both literal and historical. With much labouring, the author contends that the clauses require redrafting, both from a legal and syntactical point of view. The author's attitude may be inferred from his criticism of a particular clause in the grant, concerning which he says (p. 113), 'Thus a prostituted meaning has been brought about by unappreciative amendment and the practice of office-like copying.'

It is not easy to recognize the class of 'critical student' to whom the pages are suitable. To place the book in the hands of a beginner can hardly have been intended, while to present it to the advanced student might as much court criticism as impart instruction. It is probable that many of the conclusions, and much of the argument, would have been varied if there had been further research into the law and history of the subjects with which the clauses of the patent deal. But as long as the cases in the Court stand as precedents and the law remains uncodified, the exact wording of the grant is of little importance. Indeed, it might be asserted with some degree of truth that 'Edward VII, by the Grace of God' might, with the date and seal, sandwich a bedding of etceteras enclosing the title of the invention, and the patentee, so far as his protection was concerned, would be but little the worse. However this may be, the advanced student may, perhaps, usefully peruse the book on the chance that some aspect of the matter here presented has previously escaped his attention.

The Law of Wills. By A. Guest Mathews. London: Stevens & Haynes. 1908. 8vo. xxxv and 376 pp. (*7s. 6d.*)

This work is written primarily for students. It contains a lucid explanation of the rules and doctrines relating to the law of wills and is comprehensive enough for Honours students. It is arranged in numerous chapters, each chapter containing some familiar heading which will enable the reader readily to find the subject he wants. The symmetry of the work is, however, by no means perfect. For instance, the question of testamentary capacity is dealt with after the formalities and form of a will, and it is discussed under the negative heading of objections to the validity of a will. Residuary gifts are treated of before particular legacies and annuities.

The work will also be useful to practitioners for occasional reference on account of its lucid exposition of many of the equitable doctrines of construction, such as conversion, reconversion, satisfaction, &c. These doctrines are indeed made rather too prominent for a student's purposes: he is more likely to seek them in his textbooks on equity. On the other hand, he will miss the usual chapter on death duties appropriately found in other students' books on Wills. The author has expressed the law as to words of futurity in a will very clearly, his statement that the ordinary meaning of the words used must govern the construction showing a recognition of a judicial tendency which has latterly become even more marked, and which has received recent confirmation from the words of the Master of the Rolls in *In re Cope, Cross* v. *Cross* [1908] 2 Ch. 1.

Deeds Registration: A Treatise on the Law of Registration of Documents affecting Land under the Registration of Deeds Acts of Australasia, with references to analogous Statutes and Cases on them in England, Ireland, Canada, West Indies, Ceylon, Straits Settlements, &c. By JAMES EDWARD HOGG. London: Stevens & Sons, Lim.; Sydney: The Law Book Company of Australasia, Lim.; Melbourne: Charles F. Maxwell (G. Partridge & Co.). xxix and 172 pp.

THIS book is by the author of several well-known books on registration of title. It contains an account of the law as to registration of deeds in Australasia, i.e. the six states of the commonwealth of Australia, the Dominion of New Zealand, the crown Colony of Fiji, and the territory of Papua. It is hardly possible for an English lawyer to criticize the statements contained in this book as to Australasian law, but we may say that they are stated very clearly.

The book is, however, interesting to an English lawyer owing to the very useful disquisitions on the English and Irish Registry Acts. The author suggests that as the Australasian decisions are founded on the common law and case-law used in the English Courts, modified only by local statutes, they may be accepted as valuable judicial opinions, not necessarily authoritative.

The discussion of the effect of notice of an unregistered assurance, at p. 87 et seq. will be found valuable by an English lawyer; see a collection of cases as to what amounts to notice at p. 101 et seq.

The English practitioner has often to prepare powers of attorney to be used in the Colonies. At p. 42 will be found a valuable collection of enactments relating to, and a discussion of, the method and effect of registering a power of attorney in each of the Australasian colonies. The practical conclusion at which we arrive is that if a power of attorney is given in this country to do an act in more than one of the Australasian colonies, or in one of them and in some other country, it will be prudent to execute more than one copy of the power so as to enable an original to be produced, and, apparently in some colonies, to be left at the office for registration. It will also be necessary to inspect the Acts as to registration, &c., in the colony in which the power is to be exercised, for the purpose of seeing if any special provisions ought to be inserted.

The Law of Tender. By GEORGE LUCAS BEYNON HARRIS. London: Butterworth & Co. 1908. La. 8vo. lxx and 374 + [42] pp. (21*s.* net.)

IF there is any person but the reviewer who reads the 'Introductory Remarks' of modern textbooks, he will experience a new and unexpected pleasure on opening Mr. Harris's volume. One can imagine with what relish he will read that 'Tender, then, is one of those radiant gems of elemental justice which, drawn from the rude primordial judicatures of Barbarism, gleam with augmented lustre in the polished jural systems of the cosmic periods of law.' That 'It will be found to overwhelm the complacency of the usurer, and its trail to intersect at innumerable angles the stony domain of Interlocutory Procedure,' or that 'clothed with a mantle spun upon the delicate loom of equity, it will be found to shield the distressful mortgagor from the bleak and pestilent blasts of the mortgagee in possession.' How inspiriting will he find Mr. Harris's picture of the 'Praetor Peregrinus, groping with seer-like sagacity through an exogenous mass of material . . . presciently' perceiving the necessity of developing the

Convention, and finally advancing 'with timorous apprehension ... towards the greatest of his reforms.' These are but some of the gems which will cause him to bless the 'kindly insistence of a distinguished member of the Bar' and the 'suit of importance' which were respectively the '*causa causans*' and the '*causa sine qua non*' of the publication of Mr. Harris's work.

When Mr. Harris comes to grips with his subject he writes (save for an occasional flash) much like any other text writer, and, except where he is dealing with equitable doctrines, his work is careful and complete. His statement of equitable principles is apt to be misleading. Thus on p. 92 he cites *Ravald* v. *Russell* (Younge 9) and *Prout* v. *Cock* [1896] 2 Ch. 808 in support of the proposition that the remainderman or reversioner may redeem a mortgage on the freehold, without stating the limitations imposed on this right by the right of option of the owner of the particular estate. At the bottom of the same page occurs an observation that 'interest due upon a mortgage of money which is in settlement, will not be considered as in the nature of rent,' to which it is difficult to attribute any definite meaning.

Again Mr. Harris has not a very clear conception of the effect of section 17 of the Trustee Act, 1893, and section 56 of the Conveyancing Act, 1881, and the rather difficult cases that have been decided on those sections. *King* v. *Smith* [1900] 2 Ch. 425 did not decide, as he suggests at p. 107, that the person tendering must 'assume that the solicitor producing the deed, is acting as solicitor for the person legally entitled to give a discharge for the money,' though Farwell J. indicated *obiter* his belief that this was the correct view. The dictum of North J. in *Day* v. *Woolwich &c. Society*, 40 Ch. D. 491 is quite as strong the other way, and is on p. 117 apparently accepted by Mr. Harris, for he there states that the solicitor who produces the deed (under s. 56) must be in fact acting for the person who has signed the receipt. He must also, according to Mr. Harris, 'be specially authorized to accept the Tender'; a proposition which is only true of a solicitor appointed by trustees under the Trustee Act, 1893, s. 17 (*Hetling and Merton's Contract* [1893] 3 Ch. 269). On p. 252, it would be more correct to say that acts of Part Performance, to take an agreement out of the operation of the Statute of Frauds, must be referable to *an* agreement, not necessarily to *the* agreement. The statement on p. 261 that 'a set of trustees' may legally 'delegate their duties to one or more of their number' is, to say the least of it, excessively wide, and is in no way borne out by *Lee* v. *Sankey*, L. R. 15 Eq. 204, which Mr. Harris quotes in support.

The book is well indexed and arranged, but there are a considerable number of misprints, no less than five, *exempli gratia*, in the quotation from Lat. 109 on p. 19.

On the whole the volume should be useful, though it comprises a good many subjects which have little or no connexion with one another in principle and are already sufficiently dealt with in works on the branches of law to which they more properly belong.

Southampton Record Society. *Leet Jurisdiction in England, especially as illustrated by the Records of the Court Leet of Southampton.* By F. J. C. Hearnshaw. Southampton: Cox & Sharland. 1908. xv and 406 pp.

This bulky volume unfolds the mysteries of an important local tribunal, and fills a gap in our knowledge of institutional history. In the first part

the author examines the leet in legal theory and depicts 'the ideal standard of leet jurisdiction set up by the lawyers'; in the second part he deals with the leet in practice, especially as illustrated by the records of Southampton from the sixteenth century onward; in the third and last part, which is very brief (pp. 327–58), he gives a survey of the history of leet jurisdiction. This subdivision of the matter into three parts is bewildering, and necessitates many cross-references and repetitions. A simple chronological treatment, with fewer headings and subheadings, would have enabled the author to compress the results of his investigations into a less unwieldy and more readable volume.

In rejecting Maitland's theory that the sheriff's tourn originated in the Assize of Clarendon, he says, 'the position which I have ultimately felt bound to take is that the Assize of Clarendon marks, not an increase, but a diminution of the sheriff's power' (p. v); yet this view does not appear to be incompatible with the acceptance of Maitland's theory. In fact, Mr. Hearnshaw does not throw much new light on the origin of the tourn and the leet, though he presents some novel conclusions regarding the early relation of the presentment jurors to the capital pledges. 'Einfassen' for 'Einsassen' (p. 20, n. 7) makes a German citation unintelligible, and the reference to the title of Gneist's book, from which the citation was taken, is wrong. The statement that many charters of Richard I and John exempted burgesses from the sheriff's tourn (p. 18) is misleading, for most of these charters merely exempted the burgesses from pleading outside the walls of the borough, and none of them specifically mentions the sheriff's tourn. But the monograph as a whole exhibits a high grade of scholarship, and will doubtless be accepted as the standard work on leet jurisdiction. It may be of interest to note that a history of the frank-pledge system, which supplements Mr. Hearnshaw's study, especially as regards the medieval period, has recently been presented as a doctor's thesis at Harvard University, and is now being put into shape for publication.

The Law in General Medical Practice: some Chapters in Everyday Forensic Medicine. By STANLEY B. ATKINSON, M.B., B.Sc., Barrister-at-Law. London: Henry Frowde, Oxford University Press. 1908. 8vo. viii and 233 pp.

ANYTHING from the pen of such an authority on Medical Law as Dr. Stanley B. Atkinson should ensure its favourable reception by the medical and legal professions. In 'The Law in General Medical Practice' Dr. Atkinson fills up many gaps left in the student's forensic knowledge when he finally reaches the fully-fledged state: for which reason, the work before us may be perused with equal benefit both by the student and the practitioner of medicine. It should be no less useful to the lawyer seeking light in medico-legal questions. It has been said that, after qualifying, a medical man begins to learn something about his profession: and, although this statement must be 'read sarcastic,' still, it is a fact that the conduct of many of the smaller, less important, every-day duties which fall to the lot of the busy practitioner, has often to be learned by him by unpleasant experience. And in no portion of his profession is this more true than in the medico-legal and medico-ethical branches. It is largely with these everyday experiences that Dr. Atkinson deals.

The first chapter of this useful little work gives hints as to the ethical relations subsisting between doctor and clergyman, doctor and family, &c.: details the privileges and duties of a medical man: gives advice on his relations towards various public officials, and ends up with useful details on the method of examining a patient in cases where medical evidence may subsequently be required.

Chapters ii and iii deal with medical evidence, and medical certificates and reports, and will repay careful reading. The law of defamation as affecting the medical practitioner is well and clearly set out in chapter iv; whilst 'Negligence and Malpractice' is of special importance in these days when every patient considers himself in a position to criticize his doctor's supposed lack of skill or want of attention.

The chapter entitled 'Some difficult Clinical Occasions' contains valuable matter on such vexed subjects as the 'definition of drunkenness'; 'Good-Health'—in relation to declarations in proposals for life-assurance; the medico-legal aspect of 'Hypnotism'; the conduct of the medical attendant in suspected cases of poisoning, &c., &c.

An excellent bibliography of recent medico-legal literature, and an index to cases cited, ends a very readable and useful little work, which we can recommend alike to the qualified and to the unqualified medical man and the legal practitioner.

We have also received:—

A Summary of the Law of Companies. By T. Eustace Smith. Tenth Edition by the Author, assisted by W. A. Bewes. London: Stevens & Haynes. 1908. xxi and 321 pp. (*7s. 6d.*)—The ninth edition of this work, which was published in 1907, was by the author and Mr. Arthur Stiebel, and the name of the latter appears on the cover of the tenth edition, although it is not on the title-page. The fact that a new edition has so soon followed the last previous one speaks well for the usefulness and popularity of the work, but the passing of the Companies Act, 1907, necessitated the re-writing of parts of the book. Mr. Smith has included in the new edition a chapter on limited partnerships. Like many other writers he expresses the opinion that 'it will usually be found more easy to work a business as a private company than as a limited partnership.' F. E.

The Companies Acts, 1862–1907. By William Godden and Stamford Hutton. London: Effingham Wilson. 1908. x and 428 pp. (*5s.* net.)—This is a reprint of the Companies Acts and of some other enactments relating to companies, together with the revised Table A, the Winding-up Rules, 1903, and some regulations of the Board of Trade. The Companies Acts will shortly be consolidated into one statute, and it might appear at first sight that the book under review was unnecessary. As a matter of fact it will be most useful to those who have to deal with the bill now before Parliament when it becomes law, for the authors of the book have given excellent cross-references, in their notes to the various sections, to other provisions of the Acts. No authorities are cited, but these can be found in other books which are at the elbows of most lawyers. It should be added that the sections of the earlier Acts show the amendments in them which have been made by later statutes, and that the Act of 1907 is so typed as to show the alteration made by it in the law as laid down by the Act of 1900. F. E.

Laws relating to Foreigners and Foreign Corporations. By G. F. Emery. London: Effingham Wilson. 1908. xi and 157 pp. (*2s. 6d.* net.)—Section 35 of the Companies Act, 1907, requires every company incor-

porated outside the United Kingdom, which on the first of July, 1908, has a place of business within that Kingdom, to file certain documents with the Registrar of Joint Stock Companies within a limited time, to file annual statements with the registrar, and, in certain cases, to state the name of the company and the place of its birth in its prospectuses, on its British places of business, and in its letters and other documents. The section also provides for service of process and notices at the address required to be registered. This section, which probably suggested the book, is adequately dealt with, but it is only one of many matters which interest and affect foreign traders in this Kingdom. As the author says, 'The Merchant Shipping Acts apply to every foreign vessel which enters its ports,' and the Patents Act, 1907, is of supreme importance to every foreign inventor. The author modestly warns his readers not to expect to find an unfathomable mine of information in the 148 pages of the book, but what it contains will be found useful, not only to the foreign traders to whom it is principally addressed, but also to British lawyers and laymen. F. E.

Die Weltanschauung der Jurisprudenz. Von ALFRED BOZI. Hanover: Helwing. 8vo. viii and 227 pp.—This book criticizes the defects which, according to the author, characterize the legal doctrines and modes of procedure prevailing at present in the German Courts, and which in his view are still under the influence of the formulas of mediaeval scholasticism. He advocates a system of jurisprudence based on the methods of the natural sciences and recognizing the doctrine of evolution as applicable to the growth and development of legal institutions. The ideas expressed by the author are not entirely original and his arguments and illustrations are not always convincing, but a discriminating reader will nevertheless find the book interesting and instructive. E. S.

Russisches Recht; Vormundschaftsrecht, Patentlizenz, Rücktritt, Vertragsstrafe: ein Gutachten von Dr. F. K. NEUBECKER. Stuttgart: Deutsche Verlagsgesellschaft. 1908. 8vo. 141 pp.—This is an opinion written by a German jurist on some points of Russian law arising in a case which was tried in a German Court. By way of appendix a comparative statement is added dealing with the rules contained in various systems of law, as to the right of a party to a bilateral contract to refuse performance of his obligation, in the event of a breach on the part of the other party. In so far as this statement deals with English law it does not show any traces of profound study. E. S.

La Doctrine de Drago. Par H.-A. MOULIN. Paris: A. Pedone. 8vo. xii and 368 pp. 7 fr.—This volume consists of essays by the author, who occupies the chair of international law at the University of Dijon, G. W. Scott, and Amos T. Hershey (the two latter in French translation), pretty full extracts from the proceedings of the Hague Conference of 1907 relating to the 'Drago doctrine,' and a bibliography. It will be welcome to special students of public law and diplomacy, as it collects the important materials in a moderate compass, and M. Moulin's own observations, though we do not agree with them at all points, are always worthy of attention. How far he is right in regarding the adoption of General Porter's rule by the Hague Conference as an unqualified victory of the 'Drago doctrine' is a question for specialists to consider at leisure.

Matthiae Calonii praelectiones in iurisprudentiam civilem: ediderunt WILHELM CHYDENIUS et VÄINÖ NORDSTRÖM. Helsingfors: 1908. 4to. Five leaves unnumbered; 677 pp.—Calonius (1737–1817) was a Finnish

jurist, and Rector of the University of Abö at the time of the Russian conquest in 1808–9: he afterwards held office under the new government without abandoning his academical work. These lectures (not prepared for publication by the author) are now edited from a MS. in the University library of Helsingfors. The law therein expounded appears to be Swedish law as applied in Finland about the end of the eighteenth century, and the language is a businesslike professional Latin which does not pretend to be classical. An English writer knowing nothing of Swedish or Finnish law can say nothing more except that the book is very handsomely produced and has all the appearance of being well edited.

Verschollenheit und Todeserklärung nach deutschem und ungarischem Rechte, etc. Dargestellt von Dr. ELEMER BALOG. Berlin: Puttkammer & Mühlbrecht. 1908. 8vo. 212 pp.—A monograph on presumption of death under German and Hungarian law, with reference to the drafts now in hand of a Hungarian Civil Code and Civil Procedure Code.

A Lawyer's Manual of Book-keeping. By H. HUGHES-ONSLOW. Second Edition. London: Butterworth & Co. 1908. (10*s.* net.)—This book is intended to convey a knowledge of book-keeping sufficient to enable lawyers and others to keep their own books of account according to the most modern and simple principles of double entry. The book is prescribed by the Council of the Law Society for their examination in book-keeping.

A Digest of English Civil Law. By EDWARD JENKS and others. Book II, Part III, Law of Quasi-Contract and Tort. By J. C. MILES. London: Butterworth & Co. Boston, U.S.A.: The Boston Book Co. 1908. La. 8vo. xlvi and 315 to 429 pp.—Review will follow.

A Digest of the Law of England with reference to the Conflict of Laws. By A. V. DICEY, K.C. Second Edition. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1908. La. 8vo. xcii and 883 pp. (30*s.*)—Review will follow.

Introduction to the Study of the Law of the Constitution. By A. V. DICEY, K.C. Seventh Edition. London: Macmillan & Co., Lim. 1908. 8vo. xvi and 571 pp. (10*s.* 6*d.* net.)—Review will follow.

The Laws of War on Land (written and unwritten). By THOMAS ERSKINE HOLLAND, K.C. Oxford: at the Clarendon Press. 1908. 8vo. viii and 149 pp. (6*s.* net.)—Review will follow.

The French Civil Code. Translated with notes explanatory and historical and comparative references to English Law. By E. BLACKWOOD WRIGHT. London: Stevens & Sons, Lim. 1908. La. 8vo. xx and 480 pp. (25*s.*) —Review will follow.

Small Holdings and Allotments. By GEORGE ARTHUR JOHNSTON. London: Effingham Wilson and Stevens & Sons, Lim. 1908. La. 8vo. lxxx and 612 pp. (16*s.* net.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by O. A. SAUNDERS, J. G. PEASE, and W. BOWSTEAD. Vols. XCIX and C. 1853–1855. (17 Beavan; 2 Drewry; 4 Ellis & Blackburn; 15 & 16 Common Bench; 2 Weekly Reporter.) London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. Vol. XCIX, xviii and 919 pp.; Vol. C, xvi and 909 pp.

Ruling Cases. Arranged, annotated and edited by ROBERT CAMPBELL. With American notes by JAMES T. KEEN. Vol. XXVII (First Supplementary volume). London: Stevens & Sons, Lim. Boston: The Boston Book Co. 1908. La. 8vo. xliii and 788 pp.

The Acts relating to Estate Duty and other Death Duties included in the Finance Act, 1897. By Sir EVELYN FREETH, assisted by C. R. ELLIOTT. Fourth Edition. London: Stevens & Sons, Lim. 1908. 8vo. xxvii and 355 pp. (12*s.* 6*d.*)

Book of Practical Forms for use in Solicitors' Offices. By CHARLES JONES. Vol. II. London: Effingham Wilson. 1908. 8vo. xvi and 428 pp. (5*s.* net.)

Workmen's Compensation Cases. Vol. IX. (Sept. 1906–Aug. 1907.) Edited by the late R. M. MINTON-SENHOUSE, His Honour Judge RUEGG, K.C., and F. J. COLTMAN. London: Butterworth & Co. 1908. 8vo. xiii and 151 pp.

The Jews and the English Law. By H. S. Q. HENRIQUES. London: J. Jacobs. 1908. 8vo. xxvii and 324 pp.—Review will follow.

The Laws of Insurance: Fire, Life, Accident, and Guarantee. By J. B. PORTER, assisted by W. F. CRAIES. Fifth Edition. London: Stevens & Haynes. 1908. 8vo. xlvi and 594 pp.

Lumley's Public Health. Seventh Edition. Two Vols. Vol. I. By ALEXANDER MACMORRAN, K.C., and JOSHUA SCHOLEFIELD. Vol. II. By ALEXANDER MACMORRAN, K.C., and S. G. LUSHINGTON. London: Butterworth & Co.; Shaw & Sons. 1908. La. 8vo. cc, xvi and 2444 pp., index 224 pp. (£3 17*s.* 6*d.* net.)

A Concise Treatise on the Law relating to Executors and Administrators. By ARTHUR ROBERT INGPEN, K.C. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. 1908. La. 8vo. lxxvii and 714 pp. (25*s.*)—Review will follow.

History of the Roman Dutch Law. By the Hon. J. W. WESSELS, a judge of the Supreme Court of the Transvaal. Grahamstown, Cape Colony: African Book Company, Lim. 1908. 8vo. xv and 791 pp.

Cardinal Rules of Legal Interpretation. Collected and arranged by EDWARD BEAL. Second Edition. London: Stevens & Sons, Lim. 1908. La. 8vo. lxxx and 674 pp. (20*s.*)—Review will follow.

A Practical Handbook on the Land Laws of New Zealand. By T. F. MARTIN. Christchurch, N.Z.: Melbourne and London: Whitcombe & Tombs, Lim. 1908. 8vo. 100 pp.—Review will follow.

The Law of Horses. By G. H. H. OLIPHANT. Sixth Edition. By C. E. LLOYD. Veterinary portion revised by T. C. BARTON, M.R.C.V.S. Canadian Notes by CHARLES MORSE, D.C.L. London: Sweet & Maxwell, Lim. Toronto: The Carswell Co., Lim. 1908. 8vo. xlvii and 464 pp. (20*s.*)

A Selection of Leading Cases in the Criminal Law. By HENRY WARBURTON. Fourth Edition. London: Stevens & Sons, Lim. 1908. 8vo. xxvi and 556 pp. (12*s.* 6*d.*)

The Punjab Pre-Emption Act (II of 1905). With comments and notes of decided cases. By SHADI LAL. Second Edition. Lahore. 1907. 8vo. 236 pp. (*Rs.* 4.)

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